Supreme Court, U.S.
FILED
07-585 OCT 31 2007
OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

PETRA PRESBYTERIAN CHURCH,
Petitioner,

v.

VILLAGE OF NORTHBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN W. MAUCK
Counsel of Record
RICHARD S. BELL
J. LEE MCCOY, JR.
NOEL W. STERETT
MAUCK & BAKER, LLC
ONE NORTH LASALLE STREET
CHICAGO, ILLINOIS 60602
(312) 726-1243

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890.5001

QUESTIONS PRESENTED

I. Whether this Court should resolve a Circuit conflict over what constitutes a governmental imposed "substantial burden" on the land use of a religious assembly under the Religious Land Use and Institutionalized Persons Act of 2000[1], ("RLUIPA")?

II. Whether this Court should rule that religious assembly has as much protection under RLUIPA as live nude dancing under the First Amendment?

III. Has RLUIPA effectively precluded meritorious claims of religious assemblies under the Free Exercise Clause?

---

[1] 42 U.S.C. § 2000cc.

PARTIES TO PROCEEDINGS

Petitioner Petra Presbyterian Church was the plaintiff-appellant in the court below. Respondent the Village of Northbrook was the defendant-appellee below. There are no other parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL & STATUTORY PROVISIONS 5

STATEMENT 5

QUESTIONS PRESENTED 16

I. Whether this Court should resolve a Circuit conflict over what constitutes a government imposed "substantial burden" on the land use of a religious assembly under RLUIPA? 16

II. Whether this Court should rule that religious assembly has as much protection under RLUIPA as live nude dancing under the First Amendment? 23

III. Has RLUIPA effectively precluded meritorious claims of religious assemblies under the Free Exercise Clause? 27

CONCLUSION 33

APPENDIX:

Appendix A: Opinion of the United States Court of Appeals for the Seventh Circuit (June 7, 2007) 1a

Appendix B: Memorandum and Order of the United States District Court, Northern District of Illinois, Eastern Division (January 11, 2006) 14a

Appendix C: Report and Recommendation, United States District Court, Northern District of Illinois, Eastern Division (August 28, 2003) 29a

Appendix D: Order Denying Rehearing *en banc*, United States Court of Appeals for the Seventh Circuit (July 3, 2007) 66a

Appendix E: U.S. Const. amend. I 67a

Appendix F: RLUIPA §§ 1, 2 ..... 68a

Appendix G: Village of Northbrook, Ill., Zoning Code § 11-302 ..... 71a

Appendix H: Village of Northbrook, Ill., Zoning Code Appendix B Master Land Use Table .. 73a

Appendix I: Thom S. Rainer, Ph.D., *An Analysis of the Impact of Borrowed Facility Usage for Churches With Specific Application to Petra Presbyterian Church* (February 7, 2005) . . . 75a

TABLE OF AUTHORITIES

Cases

American Communications Assn. v. Douds,
339 U.S. 382 (1950) 30, 31

Church of Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 27, 30, 32

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) ("*CLUB*") ... 17, 28

Congregation Kol Ami v. Abington Twp.,
No. 01-1919, 2004 U.S. Dist. LEXIS 16397
(E.D.Pa. Aug. 17, 2004) 28

Congregation Temple Israel v. Creve Coeur,
320 S.W.2d 451 (Mo. Sup. Ct. 1959) 26

Employment Div., Dept. Of Human Resources of Ore. v. Smith,
494 U.S. 872 (1992) 30-32

First Covenant Church v. City of Seattle,
840 P.2d 174 (Wash. 1992) 21, 22

Guru Nanak Sikh Society v. County of Sutter,
456 F.3d 978 (9th Cir. 2006) 3, 19-21

Islamic Center of Mississippi, Inc. v. City of Starkville,
840 F.2d 293 (5th Cir. 1988) 17, 22, 29

Jimmy Swaggart Ministries v. Board of Equalization,
493 U.S. 378 (1990) 21

Larkin v. Grendel's Den, Inc.,
459 U.S. 116 (1982) 29

Midrash Sephardi, Inc. v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004) 3, 19, 28-30

Mooney v. Village of Orchard Lake,
53 N.W. 2d 308 (Mich. Sup. Ct. 1952) 26

Rector, Wardens & Members of Vestry v. City of New York,
914 F.2d 348 (2d Cir. 1990) 17, 18

Schad v. Mount Ephraim,
452 U.S. 61 (1981) 23-27

Sherbert v. Verner,
374 U.S. 398 (U.S. 1963) 19, 30, 31

Texas Monthly, Inc. v. Bullock,
489 U.S. 1 (1989) (plurality opinion) 21

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 1

Vision Church v. Village of Long Grove,
468 F.3d 975 (7th Cir. 2006) 17

Washington v. Klem,
497 F.3d 272 (3rd Cir. 2007) 16, 17

Constitutional Provisions

Free Exercise Cla[illegible] 1, 17, 22, 27, 28, 31

U.S. Const. amend. I 3, 5, 17, 23-25, 30, 31

Conn. Const. of 1818, Article VII, § 1 26

Statutes

28 U.S.C. § 1254(1) 4

42 U.S.C. § 2000cc(a)(1) 5

42 U.S.C. § 2000cc(b) 5

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA") 1-4, 14, 16-23, 25, 27-32

RLUIPA § 2 5

RLUIPA § 2(a) 17

RLUIPA § 2(b)(3)(A) 25

Other Authorities

146 Cong. Rec. S7723, S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy) ("Joint Statement") 2, 3

146 Cong. Rec. S7774, S7776 (daily ed., July 27, 2000) 25

Anderson's American Law of Zoning §12.21-12.31 (rev. 4th ed. & Supp. Nov. 2006) 26

H.R. Rep. No. 106-219 (1999) 2

Roman P. Storzer & Anthony R. Picarello Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929 (2001) 3

U.S. Department of Justice Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001-2006 (2007) (available on line at http://www.firstfreedom.gov/ff/report.htm) 2

INTRODUCTION

No other aspect of American life implicates a wider range of civil rights than land use by religious assemblies. Since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and with no guidance from this Court on the interaction of zoning laws with the Free Exercise Clause, federal and state courts have decided innumerable suits by synagogues, churches, mosques, or temples challenging municipal zoning laws and decisions. The result has been legal confusion and inconsistency. This case presents critical statutory and constitutional questions about freedom and equal protection of the laws in exercise of religion, and also in speech, association, and assembly. They are questions on which the courts of appeals (with least one state supreme court) are divided. These conflicts and tensions reflect basic disagreements about this Court's free exercise jurisprudence, and about the proper interpretation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), which Congress passed unanimously, and which could greatly benefit the federal government's defense of civil liberties today. The uncertainty caused by these conflicts negatively impacts congregations and local governments throughout this nation and has become one of the most important church-state issues of our time. The Supreme Court can bring light.

1. Before passing RLUIPA, Congress assembled massive evidence of "a nationwide problem in which [c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the

highly individualized and discretionary processes of land use regulation." 146 Cong. Rec. S7723, S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy) ("Joint Statement"). Hearings provided a substantial record of evidence indicating a widespread pattern of religious discrimination in land use regulation – discrimination that especially disfavors minorities, such as the Korean immigrant congregation affected by the Village's actions here. H.R. Rep. No. 106-219, at 18 (1999). Religious communities are often deliberately burdened, *id.* at 22. As immigration to the United States has greatly increased, protecting the rights of ethnic religious assemblies, which play an important role in socializing immigrants to American society, has become more important. But religious land use in urban areas, where immigrants now settle, is ever more likely to face severe restrictions.

2. Protecting minority religions from excessive burdens on their uses of land has been an important federal policy ever since RLUIPA's passage and is actively pursued by the United States Department of Justice today. Justice has launched a special initiative to protect religious freedom by vigorously enforcing RLUIPA. From 2001 to 2006, it reviewed 118 RLUIPA matters, filed four of its own lawsuits under RLUIPA, filed eight amicus briefs in federal appellate cases involving RLUIPA, and intervened to defend RLUIPA's constitutionality 29 times. U.S. Department of Justice Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001-2006, 25-29 (2007) (available on line at http://www.firstfreedom .gov/ff/report.htm). Indeed, Justice has been actively involved in many of the cases cited in this petition, and

it filed briefs supporting the results in *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) and *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the two cases that explicitly rejected the Seventh Circuit's definition of "substantial burden". This policy follows from the realization that land use is often at the heart of religious freedom. In most religious traditions, a place to gather, worship, and perform religious ministries is indispensable to religious exercise. The physical embodiment of a faith group – its church building – is often essential for its ability to speak, assemble, and worship together. *See* Roman P. Storzer & Anthony R. Picarello Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 945 (2001). Indeed, as Congress found in enacting RLUIPA, churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. Joint Statement at S7774. Accordingly, constraints on religious meeting spaces often impose severe religious hardships. Even where those constraints do not make religious practice "effectively impracticable" (as the Seventh Circuit requires), they often create substantial burdens.

3. Finally, a decision by this Court establishing the legal standards by which land use decisions are to be judged under RLUIPA and the First Amendment will reduce the litigation costs borne by religious bodies and local governments. Uncertainty in any area of the law breeds litigation, and that is particularly true in this area, which is now governed in large part by a federal civil rights statute interacting with an

agglomeration of about eighty years of state zoning law precedents. Seven years after RLUIPA's passage, lower courts remain deeply divided over the applicable legal standards. Uniform and definite standards will help churches and local governments predict the outcomes of litigation and negotiate acceptable solutions. This benefit will extend to the thousands of zoning boards and city councils that, subject to federal civil-rights law, make dozens of decisions about religious land use for every one that is challenged in court.

OPINIONS BELOW

The report and recommendation of the magistrate judge is reprinted in the appendix to this petition ("Pet. App.") at 29a-65a, and is unreported. The opinion of the district court (Pet. App. 14a-28a) is reported at 409 F. Supp. 2d 1001 (N.D. Ill. 2006). The Seventh Circuit's opinion affirming the decision of the district court (Pet. App. 1a-13a) is reported at 489 F.3d 846 (7th Cir. 2006). The Seventh Circuit's order denying rehearing *en banc* (Pet. App. 66a) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on June 7, 2007, and the order of the court of appeals denying petitioner's petition for rehearing *en banc* was entered on July 3, 2007. By order of September 25, 2007, this Court granted petitioner's request for an extension of time until October 31, 2007, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

This petition involves the First Amendment (Pet. App. 67a) and Section 2 of RLUIPA, specifically 42 U.S.C. § 2000cc(a)(1) and (b) (Pet. App. 68a-70a).

STATEMENT

Petra Presbyterian Church ("Petra") is a congregation of Korean-Americans, part of the Presbyterian Church in America denomination. Between 1965 and 2001, the number of Korean ethnic churches in the Chicago area increased from three to 212. Amidst that dramatic people movement, Petra was founded. In 1994 it began worship services at a United Methodist church in Chicago and in 1998, moved its worship services to Sunday afternoons, renting space at Holy Trinity Lutheran Church in Glenview, Illinois, a village next to defendant Northbrook. Petra has business offices and limited religious activities at 3005 MacArthur Boulevard in Northbrook, the property where it hopes someday to worship.

Petra's Identification of the Property. In 1995, soon after it was founded, Petra began a six-year search for a permanent worship facility. Petra had a real estate agent look for existing church buildings in the northern suburbs, where most of Petra's members reside, but none were reported for sale during the six-year period. (Statement of Agreed Facts ("SAF") ¶35). Eventually, Petra's agent suggested that Petra buy a warehouse building and convert it to a church, following the practice of churches in other suburbs.

In early 2000, with the realtor's help, Petra identified 3005 MacArthur Boulevard (the "Property") as a potential site for its church. The Property is 3.73 acres, improved with a two-story open span building combined with office space and meeting rooms containing over 162,000 sq. ft., with parking for 240 cars, located within an area of about 120 parcels of land used for business or light industry, bordered on one side by Interstate 94 and mostly residential on the other sides. The other 119 parcels are mostly warehouses, offices, or light assembly or service support facilities. Northbrook is a high income residential suburb north of Chicago, population 34,307. The Property and all 119 surrounding parcels except one were zoned I-1, light industrial, and are referred to as "Sky Harbor" in the record.[1]

Northbrook's 1988 Zoning Code. When Petra first contracted to purchase 3005 MacArthur Boulevard, Northbrook had in force its 1988 Zoning Code, which allowed all Membership Organizations except Religious Membership Organizations to locate in any I-1 zoning district without any zoning approval. Pet. App. 73a-74a. These permitted Membership Organizations included community centers, neighborhood centers, and youth centers, activity centers for the elderly or the handicapped, and senior citizens associations. Other Membership Organizations permitted in I-1 were: (a) community membership clubs with activities related to shared

---

[1] One parcel in the middle of Sky Harbor is zoned IB (Institutional Building) which allows Religious Organizations without rezoning provided the Village Trustees vote to grant "special permission."

interests, such as acting in stage plays; (b) fraternal associations and lodges; (c) singing societies giving performance of choral compositions; (d) social clubs for fellowship and activities that serve such purposes, such as dancing and potluck dinners; (e) political organizations and clubs with assembly for hearing lectures about political principles and discussing them and learning how to disseminate them, persuade others to believe in them, and enlist others to join political parties and movements; (f) historical clubs with assembly for hearing lectures on persons and events of the past and discussing their implications for living in the present; and (g) reading rooms.

Northbrook has six "community centers" in its I-1 zones. SAF ¶131. In 1998, Northbrook amended its Zoning Code to permit a high school temporarily near the Property. The school was in operation during the years 2000 and 2001.

In the 1987 Federal Standard Industrial Classification (SIC) Code (used by Northbrook in its zoning code), the general category "Membership Organizations" includes also "Religious Organizations." However, Northbrook's 1988 Zoning Code specifically and explicitly excluded Religious Organizations from the I-1 district[2]. Pet. App. 73a-74a. Moreover, Religious Organizations were not permitted as a matter of right in any of Northbrook's 24 zones. *Id.* A Religious Organization could locate only on a property zoned IB. *Id.* Thus, under the 1988 Zoning

---

[2] Religious Organizations were the only Membership Organizations excluded.

Code, a Religious Organization that owned property in an I-1 zoning district, or any other district except IB, needed to obtain a zoning map amendment (*i.e.*, a legislative rezoning of its property by the Village Board to IB) and additional approval as a special permit use. If a Religious Organization could find a suitable IB property to acquire (which Petra could not), it was still required to obtain a Special Use Permit ("SUP") which was subject to the discretion of the Village in issuance. *Id.*

Petra's Contract to Purchase the Property. In 2000, Petra's leaders were informed by their realtor that the Northbrook Zoning Code permitted membership organizations or assembly uses in Sky Harbor and that some membership or assembly uses similar to the church that Petra intended were currently located in Sky Harbor. Petra was told by its realtor that the Northbrook Zoning Code required it to get a special permit to operate a church at the Property, but that it could get the necessary zoning relief and use the building as a church because the area had other membership organizations or assembly uses, such as a public school, a club, and a religious school. SAF ¶58.

On October 10, 2000, at Petra's request, Northbrook's Board of Trustees conducted a preliminary review of Petra's proposal for use of the Property, which is required before a property owner may file a rezoning application. For the preliminary review, Petra prepared a sketch plan and narrative. At the preliminary review, the Trustees encouraged the church to proceed. Pl.'s Ex. Book, Ex. 12.

On December 8, 2000, Petra contracted to purchase the Property for $2.9 million. Because Petra faced the prospect of purchasing real estate without Northbrook's express permission to use it for worship, Petra persuaded the seller to allow a zoning contingency clause that allowed Petra to terminate the contract if it did not obtain the zoning relief it needed to operate a church. The legal effect of the clause is to require the seller to hold the property off the market, forgoing other potential sales, including sales to buyers who would not need to go through the rezoning procedures.

Petra's Application for Rezoning and Special Permit. On December 26, 2000, Petra formally applied to Northbrook for a rezoning of the Property and for a Special Permit.

The Plan Commission held its first public hearing on Petra's application February 20, 2001. On March 28, 2001, Northbrook's senior planner provided the Plan Commission with a memorandum on Petra's application that furnished some examples of recent Special Permits for other Religious Organizations that had been approved with conditions. These conditions included limits on activities within the facility, traffic control measures, and operational limitations.

At a second public hearing on April 3, 2001, two speakers expressed concern about a religious assembly near their properties. One was concerned that the trucks at his property might cause interruption of Petra's use and make him a bad neighbor. The other feared that special events at the church during the week could cause traffic problems.

After discussion with the Plan Commission, Petra, in hope of winning Plan Commission votes, proposed or agreed to acquiesce in thirteen conditions on its use of the Property and incorporated them in its application. The conditions were: (1) Petra would comply with all of Northbrook's health and safety standards, (2) it would use the Property in strict conformance with the plans reviewed and approved by the Plan Commission, (3) it would provide more landscaping, (4) Petra would apply for amendment of its Special Permit if it ever wanted to expand its facility, (5) Petra would limit occupancy to 30 people during weekday business hours, (6) it would limit occupancy to 75 people during weekday evening hours, (7) it would limit occupancy to 100 people Friday evenings and Saturdays, (8) Petra would limit occupancy to 200 people on Sundays, (9) Petra would have no more than six special events ordinarily attended by 200 to 300 people and not ever have attendance greater than 500, (10) it would provide persons for security and traffic control at any event attended by more than 200 people, (11) Petra would not permit any school activities other than Sunday school and normal Bible study, (12) Petra would agree that the Property must revert to I-1 zoning if Petra stopped using it as a church, and (13) Petra would not permit any storage unrelated to its activities as a church. On April 17, 2001, the Plan Commission voted against Petra's application, which included the thirteen conditions. The Plan Commission stated that there were too many conditions limiting the use of the Property as a church.

On May 8, 2001, the Northbrook Trustees reviewed Petra's application and the Plan Commission's recommendation, and heard a presentation from

Petra's attorney and land planner. Each Trustee voiced a different reason for opposing the application. Trustee Jaeger said he supports churches in town but only in the right location. His major concern was that a religious facility could grow to have multiple uses on days other than Sunday. Trustee Frum questioned whether to rezone Petra's property to IB. She opined that the other institutional uses in I-1 zone are more compatible than the church would be. Trustee Karagianis stated that the change in zoning for a church use would indicate to property owners that Northbrook had given up on the industrial park and he was not ready to do that. Trustee Buehler commented on the reduction of property tax revenue when a property becomes not-for-profit. Trustee Donewald said that he was concerned about conflicts between industrial uses and church uses and thought that the church should be at another location. President Damisch stated that "Petra is seeking to establish a trend of development toward religious uses." The Trustees voted unanimously to direct Northbrook staff "to prepare documents that would be consistent with denial of [Petra's application]." The Board did not vote on Petra's application *per se*.

Had Petra's application been formally denied, Northbrook would have prohibited it forever from being granted unless Petra could show substantial new evidence or some mistake of law or fact. Pet. App. 71a. Had the rezoning to IB and Special Permit been granted, Northbrook would have allowed Petra to operate a church after the Property was brought into compliance with requirements of the building code specifically applicable to assembly uses, such as requirements for washroom size and exit signs.

Petra was advised to withdraw its application so that it would not be forever barred from reapplying later. On May 17, 2001, before the next meeting of the Northbrook Board, at which a formal denial might have taken place, Petra withdrew its application.

Petra's Acquisition and Use of the Property. After withdrawing its application, Petra terminated its real estate contract. Some months later, Petra entered into another contract for the same building that did not include a rezoning contingency clause. Petra closed the purchase of the Property for $2,600,000 in October 2001. Petra undertook mortgage payments of $10,350 per month and has been making the payments since then. It purchased insurance covering the Property and use thereof at premiums totaling about $10,000 per year. Petra has purchased public utilities' goods and services for the Property at a cost of about $3,000 per month.[3]

Petra took possession of the Property and immediately began using it for such religious activities as small worship services, prayer meetings, communion, Bible studies, pastors' offices, choir rehearsals, Christian youth groups, meetings of ruling elders, and meetings of denominational groups. Petra filed this lawsuit March 18, 2003. On March 20, 2003, the district court declined to issue a Temporary Restraining Order to enjoin the enforcement of the Northbrook Zoning Code.

---

[3] In its Answer to Petra's Complaint, Northbrook admitted that Petra was entitled to rely on federal, state, and municipal law when it acquired the Property and assumed these liabilities.

On April 25, 2003, Petra decided to begin meeting in its building at 3005 MacArthur for worship as a full congregation. Beginning May 4, 2003, Petra started worship services for its entire congregation in 3005 MacArthur. Petra discontinued all-congregation worship services inside 3005 MacArthur on May 16, 2003, when Northbrook served it with a Cease and Desist order not pursuant to the Zoning Code but rather pursuant to the Building Code.

Even if Petra were to have complete plans to retrofit its building for assembly use in full compliance with all building, fire, and safety codes, Northbrook would not have issued it a building permit to prepare the Property for its large worship services, only because Northbrook's Zoning Code does not allow a "Religious Organization" there. Since May 2003 Petra has been forced to continue renting worship space on Sunday afternoons in Glenview, Illinois, and has used 3005 MacArthur for office and supplemental church activities.

In 2001 and 2002, Petra had its highest number of members, about 180, including children. By 2004, Petra's membership had fallen to less than 100, including children. In 2000 and 2001, attendance at Sunday afternoon worship services was about 130, on average. By 2004, attendance at Sunday afternoon worship services had fallen to about 80, on average. These declines in membership, and concomitant declines in income, were caused by Petra's having worship services in facilities that it does not own but rents from another entity. See Pet. App. 75a and 80a-84a (Expert Report of Thom S. Rainer, Ph.D., pp 1-2 and 7-11).

Northbrook's Amendment of the Zoning Code. In late 2000, Northbrook had first received notice that a new federal law (RLUIPA) required Northbrook to treat people assembling for worship at least as well as it treated people assembling for some other type of activity. SAF ¶101. Thomas Poupard, Director of Community Planning for Northbrook, then understood that the 1988 Zoning Code appeared to violate federal law.

As early as October 2001, Northbrook held public meetings that representatives of Petra attended, in which the requirements of RLUIPA were presented to the public and discussed. In particular, the public was told that under the federal statute Northbrook could no longer treat religious and nonreligious assemblies differently in its Zoning Code.

By early 2002, the Plan Commission had agreed that churches are land uses so similar to other such uses as community centers, nonreligious membership organizations, social services, and schools that churches and these other uses should be zoned the same. The Plan Commission proposed that Northbrook's 1988 Zoning Code be amended to eliminate its unequal treatment of religious organizations and other organizations with characteristics similar to religious organizations because in this respect the 1988 Zoning Code did not comply with good principles of land planning or with RLUIPA. Northbrook's Trustees unanimously agreed that the 1988 Zoning Code treated religious uses less favorably than similar nonreligious uses in the I-1 zoning district. SAF ¶109. Although Northbrook could have complied with RLUIPA's requirement that

religious and nonreligious assembly uses be treated in a similar manner by amending the code to include Religious Organizations along with other Membership Organizations (already permitted as uses in the I-1 zoning district), Northbrook chose instead to exclude all assembly uses from the I-1 zoning district. Northbrook's decision to eliminate Membership Organizations as permitted uses in the I-1 zoning district was not made until April 22, 2003, after Petra began worshipping in the facility and one month after Petra sought the protections of the federal court in this litigation. Until April 22nd, the Northbrook Trustees were unsure whether to include Religious Organizations with other Membership Organizations as permitted uses or to exclude them all. SAF ¶112.

Northbrook's Zoning Code, as amended April 2003. Under the April 2003 amendments, Religious Organizations remained excluded from I-1, but most other Membership Organizations were also excluded. Northbrook now allows future churches in two of its R districts[4] and allows them to apply for an SUP in 16 other districts as a "Special Permit" use. However,

---

[4] The minimum lot area in the R-1 district is 50,000 square feet. Twenty of 24 churches in Northbrook are located on lots greater than 50,000 sq. ft. For a religious organization to have property large enough to provide a building and parking in the R-1 zoning district, it would have to purchase an oversize lot, or it would have to purchase multiple lots side by side and apply for a consolidated plat, which must be approved by the Board of Trustees. The lot that Petra purchased in Sky Harbor is over 162,000 sq. ft. with parking for 240 cars. It would be difficult to find a single lot of this size in an R-1 or R-2 zoning district. Vacant land in Northbrook is scarce. SAF ¶124.

church uses which were legally begun prior to the zoning amendments but were made illegal prospectively because of the amendments are allowed to continue as "legal non-conforming uses." They are "grandfathered."

QUESTIONS PRESENTED

I. Whether this Court should resolve a Circuit conflict over what constitutes a government imposed "substantial burden" on the land use of a religious assembly under RLUIPA?

Every year religious land use disputes, certainly numbering in the thousands, occupy, confuse and/or legally confound our city councils, plan commissions, courts and congregations. Yet this Court has never explained what constitutes an impermissible burden on religious exercise in the context of zoning of religious land use. More specifically, since the passage of the RLUIPA, the circuit courts have developed widely varying definitions of "substantial burden." With the Seventh and Second Circuits on one side and the Ninth, Eleventh and Fifth Circuits (and the Washington Supreme Court) on the other, the Seventh Circuit's opinion below deepened the existing conflict[5]

---

[5] As the Third Circuit accurately described the controversy recently in *Washington v. Klem*, there is "unnecessary confusion on this issue," and "[t]he standards from the Seventh and Eleventh Circuits appear to be at opposite ends of the definitional spectrum." 497 F.3d 272, 280-81 & n.5-7 (3rd Cir. 2007). Although *Klem* is a prisoner rights case under the institutionalized persons' section of RLUIPA that is not at issue in the case at bar, the Third

about this quintessential question of civil liberty, which arises frequently in the application not only of RLUIPA section 2(a) but also of the Free Exercise Clause.

RLUIPA's "substantial burden" requirement is a potential gateway to federal protection from unjustified infringement of the free exercise of religion for millions of individuals and tens of thousands of congregations who assemble for religious exercise across the United States.

The Seventh and Second Circuits' Heavy Burden. In the decision below, the Seventh Circuit implicitly affirmed its position taken in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), and followed in *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006), that government imposes no substantial burden on exercise of religion unless it makes the acquisition of a building for worship "effectively impracticable." *CLUB*, at 761; *Vision*, at 997. This standard is essentially identical to the Second Circuit's pre-RLUIPA standard under the Free Exercise Clause, stated in *Rector, Wardens & Members of Vestry v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990)[6].

Circuit considered numerous land use cases in its discussion of the definition of "substantial burden." *Id.*

[6] The argument here, as well as the argument regarding *Islamic Center v. Starkville*, *infra*, which are both pre-RLUIPA cases, *assumes* that RLUIPA did not make the burden test for religious organizations more stringent than required by the First Amendment. Therefore, the comparisons between the circuits

Reasoning that the "central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices," a panel of that court concluded that there can be no "substantial burden" absent "coercion in religious practice, or the Church's *inability* to carry out its religious mission in its existing facilities." *Id.* at 355 (emphasis added).

The decision below deepens the inter-Circuit conflict about the meaning of "substantial burden". According to the Seventh Circuit panel, Petra failed to show that Northbrook's refusal to permit religious use of Petra's property imposed a "substantial burden" on it, despite the fact that Northbrook enforced an ordinance that did not permit religious assembly anywhere in the village but did permit non-religious assembly at Petra's property and all properties abutting Petra's property. Even after Petra bought the Property in reliance on its federal civil rights[7] to have a church there and actually used the Property for religious assembly, Northbrook has refused to concede that it illegally discriminated against and/or burdened Petra and has now made religious exercise at Petra's property legally impossible. Despite what the congregation views as heavy-handed regulations, the

---

regarding pre-RLUIPA and post-RLUIPA cases are appropriate. However, court holdings, *sub silentio*, suggest that the post-RLUIPA standard is more burdensome for religious assemblies. See Question Presented III, *infra*.

[7] Northbrook conceded that Petra was entitled to rely on federal law when it acquired the property.

Seventh Circuit found no "substantial burden" on Petra's religious exercise.

In contrast to this stringent approach, three circuits (and at least one state supreme court) have taken a more moderate view. These courts have recognized that burdens fall along a continuum between those that make a religious practice virtually impossible and those that are merely trivial inconveniences, and that middle-ground obstacles may constitute "substantial burdens" on religion for purposes of RLUIPA, just as more extreme burdens do.

The Lighter Burden in the Ninth, Eleventh and Fifth Circuits. "Substantial burden" does not mean "effectively impracticable" in the Ninth, Eleventh or Fifth Circuit (or the Washington Supreme Court). Most notably, the Eleventh and Ninth Circuits have explicitly repudiated the Seventh Circuit's definition of "substantial burden". *See Midrash Sephardi, Inc. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("declin[ing] to adopt [that] definition"); *Guru Nanak Sikh Soc'y v. County of Sutter,* 456 F.3d 978, 989 n.12 (9th Cir. 2006). Looking to this Court's *Sherbert* line of cases, the Eleventh Circuit has held that a RLUIPA substantial burden merely "requires something more than an incidental effect on religious exercise," such as "pressure that tends to force adherents to forgo religious precepts." 366 F. 3d at 1277. Indeed, the court in *Midrash Sephardi* openly criticized the Seventh Circuit's rule as "render[ing] [RLUIPA's] total exclusion prohibition meaningless."

Similarly, the Ninth Circuit, drawing on dictionary definitions of "substantial" and "burden," has held that a RLUIPA substantial burden is one that is "oppressive" to a "significantly great" extent or "impose[s] a significantly great restriction or onus upon [religious] exercise." *Guru Nanak,* 456 F.3d 978, 987 (citation omitted). The Ninth Circuit opined that such a definition of "substantial burden" is "more lenient" than the Seventh Circuit's "narrower definition of that phrase," *id.* at 989 n.12, instead asserting the law requires consideration of the "net effect of the County's two denials" of Guru Nanak's application for a conditional use zoning permit, *id.* at 991-92.

Here, Northbrook's imposition of its unconstitutional ordinance that forced Petra to apply for a rezoning ordinance and special use permit and Northbrook's refusal to grant Petra's application, combined with Northbrook's imposition of its assembly-restrictive amended ordinance[8] that prohibits religious assembly at Petra's property, had the net effect of a "substantial burden" on Petra's religious activities by the Ninth Circuit's conception. Compared to the Guru Nanak congregation, Petra faced as much (if not more) uncertainty about its prospect for success with further petitions for zoning relief.

---

[8] Northbrook amended its ordinance to exclude all assembly uses from the I-1 zoning district only after Petra had bought the property, started worship there and sought judicial protection of its federal civil rights.

The uncertainty facing Guru Nanak arose only from the County's inconsistent reasons for the permit denials. *Id.* 990-991. The burden borne by Petra arose from the apparently hostile, and certainly callous, maneuvering by Northbrook – suggesting certain conditions through its Plan Commission that curtailed Petra's religious exercise and then refusing to grant Petra's rezoning petition even after Petra agreed to them, then amending its ordinance to exclude the church after Petra had begun a use apparently protected as a federal civil right and had sued for protection of that federal civil right. Accordingly, under the Ninth Circuit's interpretation of RLUIPA, Petra faced a "substantial burden" on its exercise of religion. On the other hand, under the Seventh Circuit's "effectively impracticable" test, the burden in *Guru Nanak* would not be considered substantial for purposes of RLUIPA.

The Washington Supreme Court employed a similar analysis in *First Covenant Church v. City of Seattle*, 840 P.2d 174, 184 (Wash. 1992). Pointing to this Court's religious taxation cases, the Washington court recognized that "a financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." *Id.* at 183 (citing *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990)); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 23 (1989) (plurality opinion) (taxes may result in an unconstitutional imposition on religious activity where "the tax burden is far from negligible"). For example, where land use regulation "grossly diminishes the value of the Church's principal asset" it "impermissibly burdens [the] right to free exercise of religion" even if it does not make religious observance

impossible or impracticable. *First Covenant Church*, 840 P.2d at 184. In direct conflict with this standard, Petra faces an ongoing financial loss in the millions of dollars for a facility it cannot renovate for worship and a devastating loss of membership. Pet. App. 88a-89a. Another example of direct conflict with the Seventh Circuit is the Fifth Circuit's pre-RLUIPA decision in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988)[9] where a city's denial of a special use permit for a mosque was held to place an undue burden on the religious exercise of a Muslim university group. Although the city claimed that it denied the permit "because of concerns about traffic congestion" and that the group could locate as a matter of right elsewhere in the city or in the adjacent county, the Fifth Circuit held that the permit denial "ma[de] a mosque *relatively* inaccessible within the city limits to Muslims who lack automobile transportation, [thereby] burden[ing] their exercise of religion." *Id.* at 298-99 (emphasis added). Petra, which has endured years of delay and expense without yet getting the village's permission to worship in its building and which has no realistic prospect of finding a building in Northbrook where it would have the village's permission, bears a significantly greater burden on its exercise of religion. Thus, the Fifth Circuit's approach also conflicts directly with that of the Seventh Circuit.

---

[9] For the purposes of argument, the analysis here joins the Seventh Circuit in assuming that the threshold standard to trigger the compelling interest test under the Free Exercise Clause and RLUIPA are the same. However, Question Presented III argues that the lower courts have confused or are confused by the different standards.

In sum, the Seventh Circuit's "effectively impracticable" rule for RLUIPA substantial burden, which underlies the result below (although not specifically stated in the opinion), departs sharply from the approach taken by a number of circuit and state courts and from this Court's traditional understanding of impermissible burden on free exercise. This Court's review is needed to bring uniformity to the law and to provide the protection that Congress intended in RLUIPA.

II. Whether this Court should rule that religious assembly has as much protection under RLUIPA as live nude dancing under the First Amendment?

This case also presents the question whether religious assembly uses are to be given as much constitutional protection as adult uses are given. The Seventh Circuit's decision stands in tension with this Court's holding that municipalities may not totally exclude a land use that the First Amendment protects without a narrowly drawn law that furthers a sufficiently substantial governmental interest. *Schad v. Mount Ephraim*, 452 U.S. 61, 74 (1981).

In *Schad*, this Court invalidated a zoning ordinance that excluded the live performances of nude dancers from all zones in the municipality. *Id.* at 77. Instead of illegally barring nude dancers throughout the community like Mount Ephraim did, Northbrook, under its zoning code at the time Petra first contracted for the Property, barred both the *Shema* and *Our Father* in the context of congregational worship activities as a matter of right. It did so in *all* of

Northbrook's 24 zones. Northbrook's imposition of this unconstitutional ordinance forced Petra to apply for rezoning (a completely discretionary legislative action) and "special permission," which Northbrook then effectively denied.

Free exercise of religion, including the freedom of religious expression contained in congregational worship, is, at the very least, as important a right under the First Amendment as nude dancing. So, if *Schad* has continued vitality, federal zoning law entailed by the First Amendment invalidates a zoning ordinance that excludes churches from all zones in a municipality.

In *Schad*, this Court rejected Mount Ephraim's proffered defense of its exclusionary ordinance. *Id.* at 72. This Court held that the ordinance was not justified by the performances' conflict with plans for a commercial area or concern with problems such as parking, trash, police protection, or medical services. *Id.* at 74. Nor could the ordinance be justified as a reasonable "time, place, and manner" restriction because the zoning ordinance permitted a variety of other similar uses and there was no reason to believe that nude dancing was incompatible with the permitted uses. *Id.* at 72-75. In striking down Mount Ephraim's zoning ordinance, this Court held that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* at 68. This Court further noted that "[p]resumably, municipalities may regulate expressive activity – even protected activity – pursuant to narrowly drawn content-neutral standards; however, they may not

regulate protected activity when the only standard provided is the unbridled discretion of municipal official." *Id.* at 84, (Stevens, J., concurring in judgment).

Just as in *Schad*, the Northbrook Zoning Code permitted a wide variety of uses by nonreligious membership organizations and assemblies in many zones in the village. Petra intended to use the Property for activities essential to the religious life and practice of Petra's congregation. Furthermore, Petra engaged in many kinds of uses similar to that of the nonreligious assemblies or institutions that were permitted as of right in the I-1 zone at the time that Petra bought property there. Accordingly, on the authority of *Schad*, Northbrook's zoning ordinance violated Petra's rights under the First Amendment and was not a valid legal ground for prohibiting Petra's use of its property for worship.

Under RLUIPA § 2(b)(3)(A), which codifies the rule of *Schad*[10], a municipal zoning ordinance must freely permit religious assembly in at least some zone. Therefore, the Northbrook Zoning Code was facially invalid in its total exclusion of churches from the village without rezoning or special permission. Furthermore, because the Northbrook Zoning Code permitted many uses similar to churches in the I-1 zone, RLUIPA required a church be a permitted use also as of right in Northbrook's I-1 zone.

---

[10] See 146 Cong. Rec. S7774, S7776 (daily ed., July 27, 2000).

The Seventh Circuit's failure to protect Petra against Northbrook's total exclusion of religious assemblies (unless they obtained from the village both a rezoning ordinance[11] and a special use permit) not only departs from *Schad* but also counters over 200 years of American tradition and at least fifty years of jurisprudence that recognized the centrality of religious assembly rights. *See, e.g., Conn. Const. of 1818,* Article VII, § 1: "And each and every society or denomination of Christians ... shall have power and authority...to build and repair houses for public worship ... ." Never to petitioner's knowledge has any court upheld a zoning scheme that failed to make religious exercise a freely permitted use somewhere within a community. *See Anderson's American Law of Zoning* §12.21-12.31 (rev. 4th ed. & Supp. Nov. 2006). Two long-established decisions of state supreme courts confirm that such an ordinance is invalid. *See Congregation Temple Israel v. Creve Coeur*, 320 S.W.2d 451 (Mo. Sup. Ct. 1959) (striking down ordinances that prohibited churches in any district in the city without a special use permit: "[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."); *Mooney v. Village of Orchard Lake*, 53 N.W. 2d 308

---

[11] A rezoning ordinance amends the municipal map to change the zoning categorization of the property. This is a legislative action determined by the city council and not subject to any standards. A special use permit, on the other hand, is an administrative action that is subject to standards.

(Mich. Sup. Ct. 1952) ("[E]xclusion of ... church from an entire municipality is ... inconsistent with the spirit and genius of our free institutions and system of government and the traditions of the American people.").

Only this Court can resolve the lower courts' misunderstanding of the principles of *Schad* and its proper application to religious exercise in the religious land use context.

III. Has RLUIPA effectively precluded meritorious claims of religious assemblies under the Free Exercise Clause?

Ironically, the passage of RLUIPA has effectively lessened the protections of religious organizations in many land use circumstances. This Court in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532-33 (1993), held that "the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons," and "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Thus, an ordinance like Northbrook's, which expressly excluded "Religious [Membership] Organizations," a category of religious practice without a secular meaning, lacked facial neutrality and warranted the protection of the Free Exercise Clause. By contrast, the protection of heightened scrutiny under RLUIPA requires showing a "substantial burden" on a religious

assembly even in cases where the law *expressly* refers to a religious practice. Pet. App. 68a.[12]

In the instant case, the Seventh Circuit refused to discuss Petra's free exercise claim, dismissing it implicitly on the same grounds as Petra's RLUIPA claim—the failure to show a "substantial burden." Pet. App. 13a (free exercise claim did not warrant discussion since no substantial burden was found). But for a free exercise claim in an individualized assessment context to be actionable, the burden need not be "substantial" and certainly need not make religious assembly "effectively impracticable" as the Seventh Circuit has defined it. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003); *contrast Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining RLUIPA substantial burden as "pressure that tends to force adherents to forgo religious precepts"). The RLUIPA "substantial burden" requirement has led to conflict in the circuits, uncertainty about RLUIPA's applicability, and a conflating of Free Exercise Clause and RLUIPA protections in courts across the country. The Seventh Circuit's construction of a RLUIPA Potemkin village spanning Wisconsin, Illinois and Indiana epitomizes the complete conflation of these thresholds.

---

[12] As one district court articulated most clearly, "there are now two types of 'burdens' on the free exercise of religion: Those defined by free exercise case law both prior to and during the effectiveness of the RFRA, and those that have been recognized since the passage of the RLUIPA." *Congregation Kol Ami v. Abington Twp.*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397, 13 fn. 1 (E.D.Pa. Aug. 17, 2004).

The disparity of thresholds can be seen in the contrasting holdings of a pre-RLUIPA case, *Islamic Center of Mississippi, Inc. v. Starkville*, 840 F.2d 293, 295 (5th Cir. 1988), and a post-RLUIPA case, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004). Both cases involved individualized assessments in the land use context, and both courts recognized a burden on free exercise where the religious adherents or congregants would be forced to walk farther to the place of worship or assembly. *Midrash*, 366 F.3d at 1228 ("walking may be burdensome and 'walking farther' may be even more so. . ."); *Starkville*, 840 F.2d at 299 ("By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion."). Nonetheless, the courts reached different conclusions as a result of applying different "burden" thresholds. The court in *Midrash* measured the "walking farther" burden against RLUIPA's "substantial burden" standard and found it insubstantial and therefore inactionable. *Midrash*, 366 F.3d at 1228. The court in *Starkville* held that once a burden on religious exercise is recognized, "the government must offer evidence of an overriding interest". *Starkville*, 840 F.2d at 299 (citing this Court's statement that "the deference due a legislative zoning judgment is not merited" when a zoning ordinance burdens religious use. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982)). Once the Islamic Center in *Starkville* showed the burden, the city had to "demonstrate at least that the burden imposed serves an important government purpose and also that this purpose could not be accompanied by a means less burdensome to the exercise of religion." *Starkville*, at 300. The city failed to "show the

importance of its purpose or that it could not have been accomplished by means less burdensome to the Muslim faithful," so the Islamic Center was successful despite alleging the same burden claimed in *Midrash*. *Id.* at 303.

Whereas courts in pre-RLUIPA free exercise cases that involved "individualized assessments" put the burden of showing a compelling interest on the government once any burden on free exercise was shown,[13] courts applying RLUIPA apply its heightened scrutiny only if the plaintiffs are able to show not just an infringement, or even a burden, but a "substantial burden." Pet. App. 68a. As noted in *Sherbert v. Verner*, 374 U.S. 398, 403 (U.S. 1963), the first question courts are to ask is whether the government has imposed "any burden" on the plaintiff's free exercise. This Court confirmed the approach it had taken in analogous First Amendment contexts, where it found that even *indirect* discouragement may "undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." *Id.* at 404 (1963) *citing American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950). Just as "the fact that no direct restraint or punishment is imposed upon speech or

---

[13]After the two leading free exercise decisions of the last decade, *Employment Div. v. Smith*, 494 U.S. 872 (1992), and *Lukumi*, government needed to show a "compelling interest" only if there was a statutory facial reference to religious practice, a law restricting religious exercise which was not "generally applicable", or a religious exercise involving also rights such as free speech, free assembly or association. *Smith*, at 881-884; *Lukumi*, 508 U.S. at 532-533.

assembly does not determine the free speech question," *Douds*, 339 U.S. at 402, so the fact that no direct restraint or punishment is imposed upon religious land use should not determine the free exercise question. Where government controls, through procedures requiring individual assessments, activity protected by the First Amendment, this Court has held that even an incidental burden on free exercise must be justified by a compelling government interest. *Sherbert*, 374 U.S. at 403.

This Court has affirmed its threshold for strict scrutiny in free exercise cases that come within the individualized assessment exception to its broader holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990). Land use decisions, such as Northbrook's in this case, typify an area in which highly individualized assessments are made to determine the rights of parties, both religious and secular. Unless burdens on free exercise or governmental "individualized assessments" of religious exercise must now be "substantial" to be actionable, or unless RLUIPA is deemed to have supplanted the Free Exercise Clause in the land use context, the different thresholds mandate a basis for separate claims, separate attention, and separate grounds for relief.

In the case at hand, the way in which both the district court and the Seventh Circuit addressed, or refused to address, Petra's separate claims under the Free Exercise Clause and RLUIPA evinces an inability to recognize or at least explain the two types of thresholds. Here, the district court ruled against Petra on both its free exercise claim and its RLUIPA claim

"for the same reasons," Pet. App. 54a. Compounding the potential confusion for the lower courts, other circuits, municipalities and congregations, the Seventh Circuit saw no reason even to analyze Petra's separate free exercise claim on appeal, stating that it did not "warrant discussion." Pet. App. 13a. These courts' treatment of the separate claims exemplifies the confusion and conflating that can be seen in the contradictory decisions that cropped up around the country after RLUIPA was enacted. The different thresholds in *Smith / Lukumi* and in RLUIPA not only warrant discussion but should compel courts to address separate free exercise claims rather than to dismiss them out of hand. Without this Court's review, churches and valid free exercise claims will continue to suffer from the conflation and confusion of the different standards.

CONCLUSION

The Petition for a Writ of Certiorari should be granted on all three Questions Presented to resolve the many crucial legal confusions and inconsistencies affecting millions of Americans impacted by religious land use decisions.

Respectfully submitted.

John W. Mauck
Counsel of Record
Richard S. Bell
J. Lee McCoy, Jr.
Noel W. Sterett
MAUCK & BAKER, LLC
One North LaSalle Street
Chicago, Illinois 60602
(312) 726-1243

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-1329

[Filed June 7, 2007]

PETRA PRESBYTERIAN CHURCH,
Plaintiff-Appellant,

v.

VILLAGE OF NORTHBROOK,
Defendant-Appellee.

Before POSNER, EVANS, and SYKES, Circuit Judges.

OPINION

POSNER, *Circuit Judge*. This suit, filed in federal district court by Petra, a Presbyterian church that caters to Korean-Americans, charges the Village of Northbrook, a suburb of Chicago, with violating the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. So far as relates to this case, the Act (RLUIPA) forbids a local government to "impose or implement a land use regulation in a manner that" either "imposes a substantial burden on the religious exercise of a person, including a religious

assembly or institution, unless the government demonstrates that imposition of the burden" is pursuant to "a compelling governmental interest," or "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *Id.*, §§ 2000cc(a)(1), (b)(1). "[R]eligious exercise" is defined to include the "use, building, or conversion of real property for the purpose of religious exercise." § 2000cc-5(7)(B). The district court granted summary judgment in favor of the Village. 409 F. Supp. 2d 1001 (N.D. Ill. 2006).

In the spring of 2000, Petra discovered a property in Northbrook containing a warehouse that it wanted to convert to a church and an office building that it wanted to use for classrooms. But the property was located in a part of Northbrook that under the Village's then zoning ordinance (adopted in 1988) was zoned industrial. Membership organizations, such as community centers, youth centers, fraternal associations, and political clubs were permitted in the zone, but not churches unless the Village's board of trustees was persuaded first to rezone the property to "institutional buildings" (the only zone in which churches are permitted) and then to issue a special permit allowing a church in the rezoned property. Of the eleven applications for rezoning and permits under the 1988 ordinance made by churches, Petra's was the only one not granted.

In September of 2000, when Petra had not yet bought the property that it had its eye on, it submitted an informal request for rezoning and for a permit to the Village's board of trustees. The board conducted a preliminary review on the basis of which it made

comments favorable to the proposal, but without ruling on it. Petra then signed a contract to purchase the property (for $2.9 million) but made the purchase contingent on its being permitted to use the warehouse as a church. Petra also filed a formal application with the board for the necessary rezoning and permit. At a hearing on the application conducted by the Village's planning commission, which advises the board of trustees on land-use matters, land-owners in the industrial zone expressed opposition, and the commission recommended that Petra's application be denied. Without taking a formal vote, the board of trustees directed its staff "to prepare documents that would be consistent with denial of" Petra's application. Fearing the preclusive effect of a formal denial, Petra withdrew its application. But then, remarkably, it went ahead and bought the warehouse, albeit at a reduced price of $2.6 million, and began using it as a church.

RLUIPA had been enacted in 2000, and it caused the Village fathers to become concerned that the Village's 1988 zoning ordinance, by treating religious organizations less favorably than other membership organizations, might violate the "less than equal terms" provision of the new statute. The following year the board began a legislative process that resulted in the adoption of a revised ordinance in 2003 that banned all membership organizations (not just churches) from the industrial zone. Existing organizations were grandfathered, but of course not Petra, which had never received permission to operate a church in the zone.

Shortly after the enactment of the new ordinance, the Village sought an injunction in state court against Petra. But it based its claim not on Petra's violating the zoning code but on Petra's violating the Village's building code. Maybe the board of trustees was skittish about relying on an ordinance that might be challenged successfully under RLUIPA–Petra had already filed the present suit, which initially challenged just the 1988 ordinance.

The state court issued a preliminary injunction prohibiting Petra from "using the indoor premises [of the property] for assembly purposes" or "occupying the indoor premises of the property in numbers exceeding 60 persons total at one time limited to general business purposes for meetings, classes, choir practice, office and business use, and washroom use." The district judge interpreted the injunction as "prevent[ing] Petra from conducting worship services and limiting occupancy to 60 persons at all other times." The preliminary injunction was issued in 2003, and the following year the state court issued a permanent injunction to the same effect.

Petra's main argument is that it acquired a "vested right" to operate its warehouse as a church. A doctrine of Illinois law allows in some circumstances a land use to continue after a zoning change that would ban it, *e.g.*, *1350 Lake Shore Associates v. Healey*, 223 Ill. 2d 607, 861 N.E.2d 944, 950, 308 Ill. Dec. 379 (Ill. 2006), but only if the use was authorized by the zoning ordinance as it stood before the change. *E.g.*, *id.*; *City of Elgin v. All Nations Worship Center*, 369 Ill. App. 3d 664, 860 N.E.2d 853, 856-58, 308 Ill. Dec. 9 (Ill. App. 2006), *National Advertising Co. v. Village of Downers*

Grove, 204 Ill. App. 3d 499, 561 N.E.2d 1300, 1304-05, 149 Ill. Dec. 604 (Ill. App. 1990). And that is not the case here. Anyway, no claim under state law is before us. The district court relinquished supplemental jurisdiction over Petra's Illinois "vested rights" claim. Petra argues that that was error, that though a state law claim it arises under federal law. The argument makes no sense. The judge did Petra a favor by relinquishing jurisdiction over the state law claim, because if it were before us we would reject it on the merits, as a misreading of Illinois law.

Petra argues in the alternative for a federal "vested rights" doctrine on the basis of various provisions of the Constitution, and on RLUIPA. The argument, peppered with mysterious references to a "federal zoning law," is difficult to follow. As near as we can understand it, Petra is claiming that when it bought the property it was reasonably relying on the invalidity of the 1988 ordinance, which arbitrarily treated religious membership organizations worse than other membership organizations, thus violating not only RLUIPA but also the free-exercise clause of the First Amendment. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-34, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). (The "less than equal terms" provision of RLUIPA codifies that constitutional prohibition. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).) As a result of that reliance, Petra contends that it obtained an indefeasible right to use the warehouse for a church even if the 2003 ordinance, which would forbid such use, is valid.

We cannot find any basis, whether in cases or other conventional sources of law, or in good sense, for the proposition that the federal Constitution forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one. From the proposition that the Village should not have discriminated in the industrial zone in favor of secular membership organizations it does not follow that when it eliminated the discrimination by banning all membership organizations from the zone, this entitled the victim of the discrimination to claim, by way of remedy, discrimination in *its* favor. So strange a rule of estoppel could hardly be thought an imperative of due process, especially since, although property rights are protected (to a degree) by the due process clauses of the Constitution, the scope of those rights is determined by state law within broad limits that include the conditions under which a governmental act can render a property right indefeasible. *Crown Media, L.L.C. v. Gwinnett County*, 380 F.3d 1317, 1325 and n. 18 (11th Cir. 2004); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1333 (11th Cir. 2004); *Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1294-95 (9th Cir. 1990).

And if there were such a rule of constitutional law ("vesting by estoppel"), it would be inapplicable to this case. If the 1988 ordinance violated RLUIPA, as Northbrook comes close to conceding, Petra didn't have to comply with it. But that doesn't mean that it acquired an immunity from *all* zoning regulation. It knew or should have known that Northbrook could redo its ordinance to comply with the "less than equal terms" provision of RLUIPA in one of two ways: by

permitting religious organizations in the industrial zone, or by forbidding all membership organizations in the zone. Petra could not reasonably assume that the Village would choose the first option. And since it therefore did not *reasonably* rely on the illegality of the 1988 ordinance in going ahead and buying the property, but instead assumed the palpable risk that a new, valid ordinance would continue the ban on its desired use of the property, it has no ground for blocking the Village from enforcing the amended ordinance against it, on the theory that the Village pulled the rug out from under it by changing the ordinance.

Petra also seeks damages for the period during which it was enjoined from operating the warehouse as a church. The injunction has become final, and the judgment of a state court cannot be appealed to any federal court other than the Supreme Court. *E.g.*, *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283-86, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005); *Burke v. Johnston*, 452 F.3d 665, 667 (7th Cir. 2006). If Petra has a claim for damages that is not dependent on invalidating the injunction, it is time barred. Petra filed the present suit in March of 2003. The applicable statute of limitations, the parties agree, is two years, so that to be timely Petra's claim had to arise no earlier than March of 2001. The district court thought it arose in December 2000 because that was when Petra first "knew about the constitutional infirmity" of the 1988 ordinance. 409 F. Supp. 2d at 1006. Petra argues that its claim did not arise until May 2001, when the board signaled unmistakably that it would not grant Petra a special permit by directing

its staff to prepare documents consistent with the denial of Petra's application.

The date on which Petra first learned that the 1988 ordinance might violate RLUIPA was not the date on which its claim arose. Mere knowledge of the existence of an invalid law that might be applied to one is not an injury, *e.g.*, *Palmer v. Board of Education*, 46 F.3d 682, 685 (7th Cir. 1995); *Diaz v. Shallbetter*, 984 F.2d 850, 855 (7th Cir. 1993), *Miller v. Philadelphia Geriatric Center*, 463 F.3d 266, 271 (3d Cir. 2006), or until the injury (and who caused it) is discovered or should have been discovered. *E.g.*, *id.*; *Behavioral Institute of Indiana, LLC v. Hobart City of Common Council*, 406 F.3d 926, 929 (7th Cir. 2005); *McIntyre v. United States*, 367 F.3d 38, 51-52 (1st Cir. 2004); *Corcoran v. New York Power Authority*, 202 F.3d 530, 544 (2d Cir. 1999). Indeed, before there is an injury, there is no standing to sue for damages because no damages have accrued, *Love Church v. City of Evanston*, 896 F.2d 1082, 1085-86 (7th Cir. 1990), and obviously a statute of limitations cannot begin to run before the prospective plaintiff could sue.

But December 2000 is when Petra's claim arose, because, as the district judge noted elsewhere in her opinion, that was when Petra entered into the first contract to buy the warehouse. Although the purchase was contingent on Petra's being able to overcome the religious exclusion in the 1988 zoning ordinance, the contingency was a negative consequence of the ordinance because Petra had to pay the seller $300,000 to compensate him for the risk that the deal would fall through and he would have to find another buyer. The

$300,000 figure is the difference between the $2.6 million sale price in the second contract, which was not contingent on Petra's obtaining approval to use the property for religious purposes, and the $2.9 million price in the first contract, which was contingent on that approval. If the ordinance was invalid and therefore religious organizations had the same rights in the industrial zone as other membership organizations that, so far as appears, differ from religious ones only in being secular, then were it not for the ordinance Petra would have purchased the property without conditions and begun operating the warehouse as a church without facing an injunction. So its claim did arise more than two years before it sued, and is therefore time-barred.

That leaves Petra's challenge to the current ordinance, which it would like enjoined so that it can at last convert the warehouse to a church. This might seem an exercise in futility, since the injunction based on the building code remains in effect, though Petra could always ask the court that issued it to dissolve or modify it. But it appears that if the zoning ordinance were invalidated, the Village would issue a permit to Petra to retrofit the building to bring it into compliance with the building code, and that if Petra did that the state court would lift the injunction. So Petra's challenge to the ordinance is not moot. The new ordinance does not violate the "less than equal terms" provision of RLUIPA. So the question is whether it imposes a substantial burden on the exercise of religious rights by Petra and its flock not offset by a compelling governmental interest. The ban on churches in the industrial zone cannot in itself constitute a substantial burden on religion, because

then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-62 (7th Cir. 2003); *Midrash Sephardi, Inc. v. Town of Surfside*, *supra*, 366 F.3d at 1226-28; *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004); *see also Love Church v. City of Evanston*, *supra*, 896 F.2d at 1086-87. Religious organizations would be better off if they could build churches anywhere, but denying them so unusual a privilege could not reasonably be thought to impose a substantial burden on them. As we explained in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005), "the 'substantial burden' provision backstops the [Act's] explicit prohibition of religious discrimination. . . . If a land-use decision. . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.

When there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden. What is true is that, as in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, *supra*, once the organization has bought property reasonably expecting

to obtain a permit, the denial of the permit may inflict a hardship on it. *Id.* at 898-900. In that case the denial was so utterly groundless as to create an inference of religious discrimination, so that the case could equally have been decided under the "less than equal terms" provision of RLUIPA, which does not require a showing of substantial burden. But Petra had no reasonable expectation of obtaining a permit. Having decided to go ahead and purchase the property outright after it knew that the permit would be denied, Petra assumed the risk of having to sell the property and find an alternative site for its church should the denial be upheld (or, if illegal, legally reimposed), just like any other religious organization that wanted to build in the industrial zone.

Any such organization would have to show that a paucity of other land available for churches made the exclusion from the industrial zone a substantial burden to it. *E.g.*, *San Jose Christian College v. City of Morgan Hill*, *supra*, 360 F.3d at 1034-35. Petra did not attempt to show this. Northbrook concedes that the two residential zones (R-1 and R-2) that are the only zones in which churches are permitted by the new ordinance without a permit are "basically built up," so that to build a church in one of those zones a religious organization would have to buy lots with existing homes and demolish them. But there is no evidence concerning the availability of land in the other zones where churches are allowed to operate with a permit–other residential zones, commercial zones, office zones, the institutional building zone, and a combined residential/limited-commercial zone–or the difficulty of obtaining a permit for a church in those zones.

The Village argues, unnecessarily and none too persuasively, that it has a compelling interest in keeping religious organizations, along with other membership organizations, out of the industrial zone, even if a substantial burden on religious observance results. It has an interest, certainly. The industrial zone contains factories and warehouses that generate substantial truck traffic. It has toxic wastes, too–and no sidewalks. The traffic and its associated noise are a source of inconvenience, annoyance, and even danger (especially given the absence of sidewalks) to patrons of membership organizations, including any churchgoers. The industrial users of the zone objected to the grant of a permit to Petra because they are worried about possible tort liability, and also that restrictions on their own activities might be imposed in order to protect pedestrians. And since Illinois has rejected the doctrine of "coming to the nuisance," *e.g.*, *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 102 N.E. 992, 998 (Ill. 1913); *Oehler v. Levy*, 234 Ill. 595, 85 N.E. 271, 273-74 (Ill. 1908); *Wheat v. Freeman Coal Mining Corp.*, 23 Ill. App. 3d 14, 319 N.E.2d 290, 294 (Ill. App. 1974), owners who put their property to a sensitive use, as by using it for church services, might sue the industrial users for nuisance even though the latter had preceded them in the zone. If, moreover, the use of the zone ever became predominantly nonindustrial, the zone might be rezoned to ban industrial uses. *Chicago Title & Trust Co. v. County of Cook*, 120 Ill. App. 3d 443, 457 N.E.2d 1326, 1331-33, 75 Ill. Dec. 767 (Ill. App. 1983); *see also Fifteen Fifty North State Building Corp. v. City of Chicago*, 15 Ill. 2d 408, 155 N.E.2d 97, 101-03 (Ill. 1958).

The problem with Northbrook's effort to show that these considerations create a *compelling* governmental interest in barring churches from the industrial zone is that until RLUIPA was enacted, and indeed for years afterward, the Village was content to allow membership organizations other than churches to buy land and build freely in the zone, no permit required. But the absence of a compelling governmental interest is not relevant to a RLUIPA claim unless the challenged restriction on the use of property imposes a substantial burden on the religious organization, and this, as we said, Petra has failed to show.

None of Petra's other claims has merit enough to warrant discussion. The judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 CV 1936

[Filed January 11, 2006]

PETRA PRESBYTERIAN CHURCH,
Plaintiff,

v.

VILLAGE OF NORTHBROOK,
Defendant.

MEMORANDUM AND ORDER

Plaintiff Petra Presbyterian Church bought land in Northbrook, Illinois, to open a church. The problem for Petra is that its land is in the middle of an industrial park where churches aren't allowed. Nevertheless, Petra still wants to locate in the industrial park, and has sued Northbrook claiming that the village's zoning code violates federal and state laws, as well as the Constitution. The parties filed cross-motions for summary judgment. For the reasons that follow, the court denies Petra's seven motions for partial summary judgment, grants Northbrook's motion for

summary judgment on Petra's federal claims, and declines to exercise jurisdiction over the remaining state law claims.

BACKGROUND

The following is culled from the parties' statements of fact and exhibits. Petra is a Presbyterian church with a predominantly Korean congregation. It conducts its worship services and other church-related functions like weddings and baptisms in space rented from a Lutheran church in Glenview, Illinois.

For the past ten years, Petra has been searching for a building of its own. Unable to find an existing church for sale in the right place and at the right price, in 2000 Petra settled on property in Northbrook's Sky Harbor Industrial Park. Petra planned to convert an existing office building and warehouse into a church.

Sky Harbor lies in an area of Northbrook zoned I-1. Under the 1988 zoning code that was in effect at the time, I-1 zoning was reserved mainly for industrial uses, but also permitted membership organizations such as union halls, chambers of commerce and other organizations that would compliment area businesses. The I-1 zone specifically excluded use by religious organizations. Though use of the Sky Harbor property as a church was specifically excluded, and though the property was surrounded by manufacturing facilities such as a grinding and polishing business, a tool and die business, and a heating and air conditioning company, Petra decided that the property suited its needs.

In October 2000, Petra agreed to buy the Sky Harbor property for $2.9 million. The sales contract included a contingency clause that allowed Petra to back out if it was unable to obtain the rezoning it would need to operate a church. At the same time Petra applied for rezoning of the property to IB (institutional buildings), the only zone in which religious organizations were permitted.

Several months later the Northbrook Plan Commission held public hearings on Petra's application for rezoning. To alleviate concerns expressed by commissioners during the hearing, Petra supplemented its application with a list of 13 suggested conditions that it volunteered to follow in order to obtain rezoning. Despite the newly-suggested conditions, in April 2001 the Plan Commission recommended against rezoning.

The application was then presented to the Village Board. In May 2001 the Board asked its staff to prepare documents denying Petra's application for rezoning, deferring until its next meeting an actual vote on the application. But before the Board's next meeting, Petra withdrew its application and the Board never voted on it.

Having failed to obtain a rezoning, Petra exercised the zoning contingency clause and terminated its contract to buy the Sky Harbor property. However, within months it struck a new deal to buy the property, this time without a zoning contingency and for the discounted price of $2.6 million, $300,000 less than the original price. Petra completed its purchase in October 2001.

Petra filed this suit in March 2003 and sought a temporary restraining order preventing the village from enforcing its zoning code, claiming that the code violated the Equal Protection Clause, the Free Exercise Clause, the right to free speech, and the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. It later amended its complaint to add claims that the code violated the Establishment Clause, as well as state law claims of vested rights, legal nonconforming use, unreasonable classification and restraint, arbitrary or capricious restriction, and a claim under the Illinois Religious Freedom Restoration Act, 775 Ill. Comp. Stat. 35/15.

Although Petra's request for a temporary restraining order was immediately denied, two months later on May 4, 2003, it began conducting worship services at the Sky Harbor property. When the village discovered what Petra was doing, it notified Petra that it was violating Northbrook's building code by having too many people on its premises. On June 18, 2003, the village obtained a preliminary injunction from the Circuit Court of Cook County preventing Petra from conducting worship services and limiting occupancy to 60 persons at all other times. By then, Petra had returned to its rented space in Glenview.

In the meantime Northbrook amended its zoning code in 2003 so that *all* membership organizations were excluded from I-1 zones, including the business-related organizations that under the 1988 version of the code were allowed. The village also opened up additional zones to religious organizations where they previously were not allowed. Religious organizations

had been allowed only in the IB zone, but now were permitted as of right in two residential districts (R-1 and R-2), and in an additional 16 districts after obtaining a special permit.

Petra returned to federal court and attempted to get a preliminary injunction to prevent Northbrook from enforcing its zoning code, but that too was denied. The parties then filed motions for summary judgment. Northbrook filed a single motion seeking summary judgment on all of Petra's claims. Petra, on the other hand, filed a total of seven motions for partial summary judgment in a transparent effort to evade the page limitation. But because Petra's arguments are unpersuasive at any length, all of its motions are denied. Northbrook's motion, on the other hand, is granted as to all of Petra's federal claims. No federal claims remain after summary judgment, and therefore the court declines to exercise supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1367(c)(3).

DISCUSSION

1. Summary Judgment Standard

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Valenti v. Qualex, Inc.,* 970 F.2d 363, 365 (7th Cir. 1992), *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S.

242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, a court may grant a motion for summary judgment only when the record shows that a reasonable jury could not find for the nonmoving party. *Valenti,* 970 F.2d at 365; *Anderson,* 477 U.S. at 248.

Accordingly, the nonmoving party may withstand summary judgment only by showing that a dispute over a "genuine" material fact exists; that is, the evidence is such that a reasonable jury could render a verdict for the nonmoving party. *Anderson,* 477 U.S. at 248. The nonmoving party may not merely rest upon the allegations or details in his pleading, but instead, must set forth specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 322; *Anderson,* 477 U.S. at 248.

2. Constitutional Claims

a. Establishment Clause

The court turns first to Petra's Establishment Clause claim (Count XIII). In it, Petra alleges that under Northbrook's zoning code, Petra was required to meet several conditions in order to use its property as a church. The conditions allegedly included that (1) no more than ten people could occupy the property during weekdays, 60 people on weeknights, and 200 people on Sundays; (2) events such as weddings and baptisms were limited to six per year; and (3) Petra could not operate a school on the property. Petra contends that Northbrook subjected no other church to such conditions, and therefore it preferred other churches over Petra in violation of the Establishment Clause.

See Kaufman v. McCaughtry, 419 F.3d 678, 683 (7th Cir. 2005) (the Establishment Clause prohibits the government from favoring one religion over another without a legitimate secular reason).

None of the conditions described above were ever imposed by the village. Instead, they were conditions that Petra suggested which were ultimately rejected by the Plan Commission before Petra withdrew its request for rezoning. None of the conditions are set forth in the village's zoning code, and therefore cannot be the basis for Petra's claim that the zoning code violates the Establishment Clause.

As for the 60-person occupancy limitation imposed by the Circuit Court of Cook County, which is similar to the occupancy condition that Petra suggested but that the Plan Commission rejected, an attack upon the state-court judgment may not be waged in federal district court. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 125 S. Ct. 1517, 1526, 161 L. Ed. 2d 454 (2005) ("losing party in state court" may not turn to federal district court "seeking review and rejection of that [state-court] judgment.").

b. Other Constitutional Claims

Each of Petra's remaining constitutional claims–Equal Protection (Count I), Free Exercise (Counts III & IX), and Free Speech (Count V)–are based upon "the Northbrook zoning code before May 3, 2003," in other words the pre-amended, 1988 iteration of the code. Petra seeks both injunctive relief and money damages.

Petra's claims for injunctive relief are moot. The portion of the 1988 code about which Petra complains, specifically the provision that permitted non-religious groups to operate in the I-1 zone but excluded religious groups, has since been amended to treat religious groups and non-religious groups similarly. Because Petra claims only that the pre-amended code (not the current code) violated the constitution, its claims are moot. *See Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 762 n.6 (7th Cir. 2003) (where amendments to zoning code placed similar restrictions on religious and nonreligious assembly uses, plaintiffs challenges to pre-amended version of code were moot).

Even though a plaintiff's attempt to enjoin the enforcement of a an out-of-date zoning code is moot, the plaintiff may nevertheless be entitled to recover damages suffered during the time the code was enforced in violation of the constitution. *See* 42 U.S.C. § 1983. However, claims for damages must be timely, as determined by the applicable statute of limitations of the state in which the violation took place. *Hoagland v. Town of Clear Lake, Ind.,* 415 F.3d 693, 699-700 (7th Cir. 2005) ("For §§ 1983 and 1985 claims, the statute of limitations is determined by the law of the state in which the violation took place."). The applicable Illinois limitation is two years for personal injuries. *See* 735 Ill. Comp. Stat. 5/13-202 (personal injury statute of limitations); *Williams v. Lampe,* 399 F.3d 867, 870 (7th Cir. 2005) (§ 1983 claims in Illinois are governed by a two-year limitations period). Therefore, a § 1983 claim is timely only if filed within two years of when the "plaintiff [knew] or should [have known] that his or her constitutional rights have been violated." *Behavioral Institute of Ind., LLC v. Hobart*

City of Common Council, 406 F.3d 926, 929 (7th Cir. 2005).

The parties disagree when Petra knew or should have known about its injury, and thus when the limitations period began to run. The village contends that it began to run on December 20, 2000, the day that Petra filed its application for rezoning. According to the village, Petra knew at least by then that the code distinguished between religious and nonreligious assemblies in the I-1 zone. Petra contends that it began to run much later, specifically when the village Board directed staff members on May 8, 2001, to prepare documents denying Petra's application for rezoning.

The Seventh Circuit recently examined when the statute of limitations begins to run for claims arising from allegedly illegal zoning codes. In *Hoagland v. Town of Clear Lake, Ind.,* the plaintiff wanted to operate a helicopter and landing pad on his property. *Hoagland,* 415 F.3d at 695-96. His town's zoning code was initially silent on the issue of landing pads, but the town eventually amended its code to allow landing pads only if the owner first obtained a special use permit. *Id.* at 696.

Significantly, the Seventh Circuit did *not* conclude that the limitation period began to run only after the plaintiff tried and failed to obtain a special use permit–in fact, the court never discusses in its review of relevant facts whether the owner ever even attempted to obtain a permit. Instead, the court held that the limitations period began to run when the plaintiff should have first known that the code was

illegal, *i.e.*, when the town attempted to regulate landing pads by amending its zoning code. *Id.* at 700. Because the plaintiff filed its claims more than two years after the town amended its code, the claims were untimely. *Id.*

Petra attempts to distinguish *Hoagland* by arguing that it was first injured when the Board failed to grant its request for rezoning in May 2001–it insists that the 1988 code itself caused it no injury. Therefore, Petra concludes, its claims are timely because they were filed within two years of May 2001. However, the request that the Board failed to act upon in May 2001 was Petra's request that its property be *rezoned to IB*, not that it be allowed to conduct religious assemblies *within the I-1 zone.* Petra has offered no evidence or argument that it was entitled under the constitution to a *rezoning* to IB in May 2001, and therefore the statute of limitations could not have started running on that date. Petra's only potentially viable constitutional claim is one based upon the 1988 code's allegedly unconstitutional treatment of religious assemblies within the I-1 zone. Accordingly, the limitations period began running when Petra knew about the constitutional infirmity in December 2000, more than two years before it filed suit.

3. RLUIPA

The Protection of Religious Exercise in Land Use and by Institutionalized Persons Act prohibits governments from, among other things, imposing land use regulations that (1) substantially burden religious exercise, *see* 42 U.S.C. § 2000cc(a); (2) treat religious assemblies less favorably than nonreligious

assemblies, *see id.* § 2000cc(b)(1); or (3) unreasonably limit or totally exclude religious assemblies, *see id.* § 2000cc(b)(3). Petra contends that the 1988 version of Northbrook's zoning code treated religious assemblies less favorably and therefore violated § 2000cc(b)(1); that the village's refusal to let Petra operate a church in the I-1 zone substantially burdens it in violation of § 2000cc(a); and because no other suitable land is available anywhere in Northbrook, that the village has totally excluded Petra in violation of § 2000cc(b)(3).

a. Substantial Burden / Total Exclusion

According to Northbrook's director of development, land within the two zones where churches are allowed without a permit, the R-1 and R-2 zones, is "basically built up." Therefore, obtaining enough land to build a new church has traditionally required buying several adjacent lots with existing homes. Petra contends that the fact that Northbrook's residential zones are basically built-up, combined with the fact that churches cannot operate within the city's industrial zones, means that Petra is not only substantially burdened, but is also totally excluded from locating in Northbrook.

Petra's argument fails to account for other areas of Northbrook where churches are allowed. For instance, Petra points to no evidence about the availability of land in the 16 non-residential districts, including commercial districts where churches are allowed with a permit. On the other hand, according to the parties' agreed facts, under the 1988 code ten of the eleven churches that attempted to locate in Northbrook succeeded (only Petra failed, after withdrawing its

rezoning request). With the 2003 amendments Northbrook opened up even more land to churches so that now "70% of land in Northbrook is located in zoning districts where Religious Organizations may locate either as of right or by way of a Special Permit."

Nothing in the RLUIPA entitles Petra to establish a church anywhere it wants. The fact that Northbrook's zoning code requires it to locate somewhere other than an industrial park is not a substantial burden, let alone a total exclusion. *See Civil Liberties,* 342 F.3d at 761-62 (scarcity of land in urban areas does not require municipality to "favor [churches] in the form of an outright exemption of land-use regulations").

Petra's reliance on *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895 (7th Cir. 2005), is unpersuasive. In *New Berlin,* the Seventh Circuit held that the defendant had created a substantial burden by requiring a church to "search[] around for other parcels of land," rather than rezoning property the church already owned. *Id.* at 901. But in *New Berlin,* the city had only one legitimate reason for not granting the rezoning–the city was worried that if the property were rezoned a subsequent owner might build a school or other non-religious facility–and the church had agreed to a restrictive covenant prohibiting that. *Id.* at 900-01. In contrast, Petra has offered no evidence that it has satisfied Northbrook's legitimate concerns about allowing a church in an industrial park. In fact, Petra agrees that Northbrook's decision to prohibit *all* assembly uses in its industrial zones "is rationally related to several important planning principles,

including reduction in actual and potential land use conflicts, and preservation of industrial land."

b. Less Favorable Treatment

Although the RLUIPA prohibits governments from treating religious assemblies less favorably, a government "may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(e). Although the statute refers to policies that result in substantial burdens, the Seventh Circuit has held that governments may also avoid liability for violations of the nondiscrimination provision of the RLUIPA by eliminating the discriminatory policy. *Civil Liberties,* 342 F.3d at 762. The parties agree that the 2003 amendments to Northbrook's zoning ordinance put nonreligious assemblies on equal footing with religious assemblies. Accordingly, Northbrook has avoided liability by eliminating its discriminatory zoning provision.

4. State Law Claims

Petra alleges several state law claims, including that because Northbrook's 1988 zoning code was unconstitutional and therefore void, it was entitled to operate a church when it bought the property in 2001, and under state law theories of vested rights and legal nonconforming use, remains able to operate a church on the property even after the 2003 amendments to the zoning code.

When all federal claims have been dismissed from a plaintiff's case, a district court may decline to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). Accordingly, in its discretion the court believes that Petra's state law claims would be better evaluated in state court, and therefore declines to exercise supplemental jurisdiction over those claims. *Id.*

CONCLUSION

For the preceding reasons, the court GRANTS Northbrook's motion for summary judgment [113-1] on each of Petra's federal claims (Counts I, II, III, IV, V, IX, XII and XIII). Because no federal claim remains, the court declines to exercise supplemental jurisdiction over the remaining state law claims (Counts VI, VII, VIII, X and XI). Further, the court DENIES each of Petra's motions for partial summary judgment [120-1], [121-1], [122-1], [123-1], [124-1], [125-1], and [126-1].

ENTER:

DATE: January 11, 2006

Blanche M. Manning

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the court GRANTS Northbrook's motion for summary judgment [113-1] on each of Petra's federal claims (Counts I, II, III, IV, V, IX, XII and XIII). Because no federal claim remains, the court declines to exercise supplemental jurisdiction over the remaining state law claims (Counts VI, VII, VIII, X and XI). Further, the court DENIES each of Petra's motions for partial summary judgment [120-1], [121-1], [122-1], [123-1], [124-1], [125-1], and [126-1].

Date: 1/11/2006

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 03 C 1936

[Decided August 28, 2003]

PETRA PRESBYTERIAN CHURCH,
Plaintiff,

v.

VILLAGE OF NORTHBROOK,
Defendant.

REPORT AND RECOMMENDATION

NAN R. NOLAN, Magistrate Judge:

Plaintiff Petra Presbyterian Church ("Petra") seeks a preliminary injunction prohibiting defendant Village of Northbrook (the "Village") from enforcing a zoning ordinance that bans worship services at certain property owned by Petra. The motion was referred to this Court for an evidentiary hearing and a Report and Recommendation as to whether the motion should be granted. In making its recommendation on this matter, the Court has considered the facts and

documents set forth in the complaint and the parties' briefs and submissions, as well as the witness testimony and exhibits presented at a hearing on June 23 and continued on June 24 and 25 and July 18, 2003. For the reasons set forth below, the Court recommends that Petra's motion for a preliminary injunction be denied.

FACTUAL BACKGROUND

Petra was chartered as an Illinois not-for-profit corporation in 1994. Its congregation is a member of Midwestern Presbyterian Churches, an association of mostly Korean churches, and it is undisputed that the religious beliefs of Petra's 175 members are sincere. Tr. 85-86, 157, 173. The Village is an Illinois municipal corporation.

A. The Zoning Code

The Village of Northbrook Zoning Code dates back to 1964 but was substantially amended in 1988. The 1988 Code identified 24 separate districts within Northbrook, including eight residential districts (R-1 to R-8), five commercial districts (C-1 to C-5), five office districts (O-1 to O-5), two industrial districts (I-1 and I-2) and an institutional buildings district (IB). The Village adopted the federal government's Standard Industrial Classification System, which is a system of classifying the various types of land uses. The Village then determined whether each type of land use was permitted as of right, permitted with a special permit, or not allowed at all in each district. *See, e.g.*, PX 4; Tr. 219-20, 244, 262-63. Northbrook is largely developed and special permits allow the Village to

regulate land use to preserve the character of a particular area and to protect the public health and safety. Tr. 245, 317-18, 333, 401-03; Pl. Mem., Ex. B. According to Thomas Poupard, the Village's Director of Community Planning, the Board of Trustees (the "Board") has very limited discretion to deny a special permit. In his view, if a particular use is allowed in a district with a special permit, that use is presumed to be valid unless the Village demonstrates that it will have an adverse effect on the neighborhood or public health and safety. Tr. 289-90, 303, 321-22, 331-32. Nevertheless, he conceded that under the terms of the zoning code, the applicant appears to bear the burden of demonstrating that a particular use is valid. Tr. 432, 434-35; PX 2, 2d Supp.

Under the 1964 Code, religious organizations were allowed as of right in residential districts but could not be located in any business or manufacturing districts. In 1985 or 1986, the Village added a requirement that religious organizations obtain a special permit in order to locate in the residential districts. Tr. 294-95. When the Village amended the ordinance in November 1988, it excluded religious organizations from all districts except the IB (institutional buildings) zone. The IB zone did not exist under the 1964 Code but was created to accommodate such facilities as libraries, schools, and public, semi-public and religious institutions. Facilities that were occupied by these organizations prior to the 1988 amendment were re-designated as IB zones and allowed to remain as legal, nonconforming uses in any districts that had otherwise become unavailable to them under the amended code. *See* PX 4; Tr. 296-97, 482. The only other way to create an IB zone was to apply for rezoning of the property in

question. Thus, under the 1988 Code, a religious organization seeking to operate within Northbrook for the first time had to (1) seek rezoning of the property to IB, and (2) obtain a special permit from the Village. Tr. 320, 325-26, 426.

Unlike religious organizations, all other membership organizations were allowed as of right in five commercial districts (C-1 to C-5), three office districts (O-2 to O-4) and one industrial district (I-1 Restricted Industrial), and were allowed with a special permit in a fourth office district (O-5). They could also apply to rezone property as IB. PX 4. According to Poupard, other membership organizations were allowed in the particular I-1 district at issue here -- Sky Harbor Industrial Park -- to accommodate union halls, chambers of commerce and other organizations that would complement area businesses. Tr. 335-36. However, organizations such as community centers, youth groups, and art, music and language schools, which arguably do not complement the neighborhood industry, were also allowed in that district. Tr. 425.

B. Petra's Search for Property

Prior to October 2001, Petra did not own any property and, thus, rented space in other churches to conduct its worship services, marriage ceremonies, baptisms and other religious activities. Petra first rented space at the United Methodist Church in Chicago but in 1997 or 1998, it moved to the Holy Trinity Lutheran Church in Glenview, Illinois (the "Lutheran Church"). Tr. 30, 56-57. Petra conducts worship services at the Lutheran Church on Sunday afternoons and has also used the facility for weddings,

baptisms, bible studies and retreats, subject to the Lutheran Church's schedule. In exchange, Petra makes a monthly offering to the church of $ 500 and assists with repairs and other maintenance and improvement projects. Tr. 32-34, 55, 57, 61, 96, 102-03, 108, 165.

Beginning in 1995, Petra began searching for a building of its own. It formed a six-member committee responsible for finding an appropriate property and started a fundraising campaign to help finance the purchase. However, Petra was unable to find an existing church for sale in the desired location and at the right price. Tr. 34-36, 38. Petra ultimately hired a professional real estate agent to assist with the search. Tr. 38.

C. The Property

In September 2000, Petra found 3005 MacArthur Boulevard in Northbrook (the "Property"), an approximately four-acre parcel with a large office building and an adjacent open-span building formerly used as a warehouse. Cmplt. P2. The Property is located within Sky Harbor Industrial Park, a T-shaped area of land in northwest Northbrook that is an I-1 district consisting mainly of offices and manufacturing facilities. The buildings surrounding Petra house various businesses, including a grinding, polishing and stamping business, a tool and die company, a heating and air conditioning company, an electrical contractor, a plumbing company and a laboratory. Tr. 115, 192-93, 200-01. These businesses utilize such materials as abrasives, lasers, and flammable liquids and chemicals. Tr. 273-79. Large semi-trucks drive through

the area to pick up and drop off materials, though there was no clear testimony as to the frequency of this activity. Sky Harbor is bordered by residential districts on approximately half of its perimeter and is adjacent to a school for children in kindergarten through eighth grade. Tr. 255-56, 257-58. According to Wayne Hansen, the Village's Director of Development, these areas are separated from Sky Harbor by buffers, screening, and landscaping. Tr. 190, 194, 265-66. Sky Harbor also has numerous picnic tables and a few leisure areas, presumably for use by area employees and factory workers. Tr. 136, 141-43, 253, 255-56.

Petra had several meetings with its realtor to discuss the possibility of rezoning the Property from I-1 to IB as required by the 1988 Code, and hired an attorney specializing in zoning law to assist with the process. Tr. 43-44, 391. On September 29, 2000, Petra requested preliminary comments from the Board on its application for rezoning of the Property. On October 10, 2000, the Board conducted a preliminary review of Petra's application and shortly thereafter on December 3, 2000, Petra entered into a contract to purchase the Property for $ 2.9 million. The contract included a zoning contingency clause that allowed Petra to terminate the contract if it did not obtain the required rezoning. Tr. 46.

The Village's Plan Commission held public hearings on the rezoning issue on February 20 and April 3, 2001. PX 12, 13. Based on discussions with, and comments from the Plan Commission, Petra submitted a list of 13 conditions it agreed to follow in using the Property, including limiting its occupancy rates and landscaping the premises. On April 17, 2001, the Plan

Commission recommended against approving Petra's application, concluding that Petra required too many restrictions to be a successful operation in the I-1 district. Tr. 381-87, 458-65; PX 7, 2d Supp. On May 8, 2001, the Board considered Petra's rezoning application and asked the Village staff to prepare documents relating to a denial of the application. Before the Board had a chance to take any formal action on the rezoning, however, Petra withdrew its application on the advice of its realtor and attorney. DX 6; Tr. 47, 73, 117, 388-90.

In addition to withdrawing its rezoning application, Petra also exercised its option to terminate the contract. In September 2001, however, Petra revived the contract, this time without a zoning contingency, and agreed to purchase the Property for $ 2.6 million -- $ 300,000 less than the original purchase price.[1] Tr. 74, 117. Petra closed on the Property on October 8, 2001.

D. The Amendments to the Ordinance

In or about June 2001, the Village began the process of reviewing the zoning regulations governing religious and membership organizations within Northbrook. DX 1. On October 30, 2001, the Plan Commission and the Community Relations Commission held a joint meeting on the issue, and it went before the Board on a preliminary review in April

---

[1] In its First Amended Complaint, submitted on August 4, 2003, Petra claims that the final purchase price was $ 2.4 million. Amend. Cmplt. P7.

2002. Tr. 340. The Village held public workshops to discuss proposed amendments to the Zoning Code on October 15, November 5 and November 19, 2002, and held three additional public hearings on December 3, 2002 and January 7 and 21, 2003. DX 1; Tr. 340. Members of the clergy were invited to attend all of the hearings and workshops and Petra representatives were present for most or all of them. Tr. 340-41.

At the hearing on January 21, 2003, the Plan Commission recommended approval of amendments to the 1988 Code. DX 1; Tr. 342. The Board received the Plan Commission's recommendations on February 11, 2003 and referred them to the Planning and Zoning Committee, which reviewed them on February 25, 2003. Petra representatives attended the February 25 meeting but did not make any comments regarding the proposed amendments. Tr. 341-42. On April 22, 2003, the Board approved and adopted the amendments. Under this revised April 2003 Code, religious organizations are permitted as of right in two residential districts (R-1 and R-2), and can locate in 16 additional districts with a special permit (R-3 to R-8, C-1 to C-3, C-5, O-2 to O-5, IB and RLC). Other membership organizations are allowed in 10 districts with a special permit (C-1 to C-3, C-5, O-2 to O-5, IB and RLC). Tr. 311-12, 327-28. Poupard testified that the Village decided to exclude all membership organizations from the I-1 district because it determined that none of the organizations was appropriate in an industrial zone. Tr. 345, 545-46. Non-religious membership organizations already within the I-1 district, however, were allowed to stay as legal, nonconforming uses. Tr. 345, 348-49, 479; PX 9.

On June 12, 2003, the Village discovered what it calls "scrivener's errors" in the April 2003 Code. Specifically, the Village neglected to (1) prohibit Membership and Sports and Recreation Clubs in the C-4, I-1 and I-2 districts; (2) prohibit Physical Fitness Facilities in the I-1 district; and (3) provide that Membership and Sports and Recreation Clubs are a special permit use in the Open Space (OS) and IB districts. Petra makes much of the fact that it highlighted these inconsistencies for the Village in its June 3, 2003 Trial Brief and that the Board passed the April 2003 amendments as written. In any event, on June 16, 2003, the Board passed a supplemental amendment to the zoning code, retroactively effective on May 3, 2003, reflecting the above changes. DX 2; Tr. 506-11, 516.

E. Petra's Use of the Property

Deacon David Lee, Ruling Elder Suk Keun Kim, and Pastor Seung-Hun Kim all testified regarding the activities Petra conducts at the Property, which bears the sign "Petra Mission Center." Tr. 177. They each stated that Petra has been holding bible studies, prayer meetings and choir practices at 3005 MacArthur since the October 2001 closing date. Tr. 49-51, 52-53, 90-93, 94-95, 166-68, 185. In earlier depositions the witnesses indicated that Petra was not using the Property for anything but an office; however, the Court notes that English is not the witnesses' first language and credits the testimony offered at the hearing on this issue. In any event, Petra admits that it does not have a permit to conduct these religious activities. Tr. 184, 185. Village Director of Development Hansen testified that a permit is

required because the religious activities are not accessory uses to office space, which is the Property's principal use. Tr. 217-18, 393-94. The Village first learned that Petra is conducting bible studies, prayer meetings and choir practices at the Property during the June 2003 hearing. Tr. 207-08, 352, 406.

Petra is not the only organization using the Property. Salitek, a media broadcasting company, Lee & Lee Group, Korean Christian TV Broadcast, and the Milal Mission for disabled persons all operate out of 3005 MacArthur, rent free. Tr. 65-66, 81, 164, 166, 169, 172, 178-79. Petra does not have a permit to conduct programs for the disabled. Tr. 184.

On May 4, 11 and 18, 2003, Petra held Sunday worship services at 3005 MacArthur for the first time since its purchase. Tr. 53-54, 70, 118-19. On May 16, 2003, the Village notified Petra that it was violating the Village's building code by having so many people on the premises. Petra held services in its 238-space parking lot on May 25 and June 1, 2003 but ultimately returned to the Lutheran Church as of June 15, 2003. Tr. 55-56, 119, 209. On or about June 18, 2003, the Circuit Court of Cook County entered a preliminary injunction preventing Petra from using the Property for Sunday worship services because the Property did not comply with applicable building codes for such high occupancy rates. Tr. 119-21.

F. Petra's Lawsuit

On or about March 20, 2003, Petra sought a temporary restraining order to prevent the Village from enforcing its zoning code -- at the time, the 1988

Code. Petra claims that the ordinance violates (1) the Equal Protection Clause (Count I), Free Exercise Clause (Count III), and First Amendment right of free speech (Count V) of the United States Constitution; (2) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.* (Counts II and IV); and (3) the Illinois Religious Freedom Restoration Act ("RFRA"), 775 ILCS 35/15 (Count VI). The TRO was denied on March 20, 2003 and Petra's motion for preliminary injunction was referred to this Court for a hearing and a Report and Recommendation.

On August 4, 2003, Petra requested leave to file a First Amended Complaint, adding claims for recovery under the theories of vested rights (Count VII) and legal, nonconforming use (Count VIII). On August 6, 2003, the Court granted Petra's motion with respect to Count VIII without objection from the Village. The Village has not offered further objection to the addition of Count VII and, thus, both claims are also before the Court for review.

DISCUSSION

A plaintiff seeking a preliminary injunction must show: (1) a reasonable likelihood of success on the merits; and (2) that it has no adequate remedy at law and will suffer irreparable harm if the preliminary injunction is not granted. *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808, (7th Cir. 2002) (citing *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). If the plaintiff satisfies these conditions, the Court must then consider (3) the irreparable harm the nonmoving party will suffer if preliminary relief is

not granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992); *Jones v. InfoCure Corp.*, 310 F.3d 529, 534 (7th Cir. 2002). The Court then weighs all four factors seeking to "minimize the costs of being mistaken." *Abbott Laboratories*, 971 F.2d at 12.

A. Likelihood of Success

For purposes of this preliminary injunction, Petra seeks relief under the Equal Protection Clause of the Fourteenth Amendment, the First Amendment rights to free speech and free exercise of religion, RLUIPA, and the theories of vested rights and legal, nonconforming use.[2] Pl. Mem., p. 1; Mot. to Amend,

---

[2] Petra's only mention of its RFRA claim is a single, passing assertion that the 1988 Code violated § 15 of the statute by excluding religious organizations from the I-1 districts which, in turn, substantially burdened Petra's use of its property. Pl. Post-Trial Mem., p. 11. This is wholly insufficient to justify any review of such a claim, much less to demonstrate a reasonable likelihood of success on it. *See Pacific Tall Ships Co. v. Kuehne & Nagel Inc.*, 102 F. Supp. 2d 923, 924-25 (N.D. Ill. 2000) ("we address only those [arguments] that are fully developed and supported by relevant case law"); *Ehrhart v. Secretary of HHS*, 969 F.2d 534, 537 n.5 (7th Cir. 1992) (a court "need not devote its time to discussion of an argument raised, if at all, in a very opaque manner") (citation omitted); *U. S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("[a] skeletal 'argument,' really nothing more than

Ex. A. Before turning to each claim, the Court first considers which version of the zoning code is properly at issue.

At the time Petra filed its lawsuit, the 1988 Code was in effect. During the course of this litigation, however, the Village twice amended the code to its current June 2003 form. Petra disputes that the amendments were proper, claiming that the zoning code's provision excluding religious organizations frodm the I-1 district was simply "null, void, and of no effect" because it violated statutory and constitutional laws. Pl. Mem., p. 5; Pl. Post-Trial Mem., pp. 2-3. In support of this argument, Petra relies on *Carter v. City of Salina,* 773 F.2d 251 (10th Cir. 1985), in which property owners sued to establish that their property could be used for commercial purposes despite a contrary zoning ordinance. The court found that the ordinance was void because the city failed to comply with state statutes requiring notice and hearing prior to enactment. Thus, the plaintiffs' property could be used for restaurant or other similar uses without interference from the city. *Id.* at 254. In this case, conversely, Petra does not argue that the Village failed to follow state laws or procedures in enacting the 1988 Code or the subsequent amendments. Thus, *Carter* does not establish that the 1988 Code, the fully amended 2003 Code, or any portion of those codes, is null and void.

---

an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments") (citation omitted).

Petra's reliance on *Hazel Wilson Hotel Corp. v. City of Chicago,* 17 Ill. App. 3d 415, 308 N.E.2d 372 (1974), is similarly misplaced. In *Hazel,* the plaintiff operated a shelter care home in a business district within the city of Chicago for nearly three years. At the time, there were no zoning regulations governing the location of such facilities. In August 1970, the city passed a non-cumulative amended ordinance that allowed shelter care homes in certain residential districts. The city thereafter denied the plaintiff's application for a license to operate the shelter care home - submitted before the amended ordinance was enacted - on the grounds that such use was not permitted within the business district. *Id.* at 417, 308 N.E.2d at 374.

The court found that because the original ordinance made no provision whatsoever for shelter care homes, they were permitted to operate in any zoning area that was not incompatible with that use. 17 Ill. App. 3d at 419, 308 N.E.2d at 376. The plaintiff was legally operating its shelter care home in a business district prior to the amended ordinance, so the court held that it would be unconstitutional to retroactively deprive the plaintiff of that use. *Id.* at 419-20, 308 N.E.2d at 376. *Hazel* is clearly distinguishable from this case because the Village Zoning Code has expressly provided for religious use since its inception, but has never allowed such use in the I-1 district. Thus, nothing in *Hazel* supports Petra's theory that the zoning code, or any portion of it, is null and void.

When an ordinance is amended, the portion of a lawsuit seeking injunctive relief based on the old ordinance becomes moot. *See MacDonald v. City of*

Chicago, 243 F.3d 1021, 1025 (7th Cir. 2001) ("any dispute over the 1997 version of the ordinance was mooted by the enactment of the new ordinance"); *Penny Saver Publications, Inc. v. Village of Hazel Crest,* 905 F.2d 150, 153 (7th Cir. 1990). Indeed, amendment is precisely the type of action that courts encourage to remedy an unlawful ordinance. *See, e.g., Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003) ("a simple amendment to the ordinance could readily solve Evanston's problem in a way that eliminates the unequal treatment"). Petra may still be able to pursue a declaratory judgment and a claim for damages suffered as a result of the allegedly unlawful 1988 Code. *See, e.g., Penny Saver,* 905 F.2d at 153 (plaintiff that could not seek injunctive relief under an amended ordinance "still has a viable claim for declaratory and monetary relief"). But seeCivil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *6 n.6 (7th Cir. Aug. 20, 2003) (where the primary effect of amendments to a zoning ordinance was to "impose similar restrictions on non-religious assembly uses, rather than to relax restrictions on churches," churches' claim for damages under the old ordinance was moot). However, Petra's claims for preliminary injunctive relief are properly analyzed under the zoning code in its fully amended form.[3]

---

[3] The Court is not persuaded by Petra's suggestion that the second amendment in June 2003 was invalid or untimely because the Village enacted it only after Petra pointed out a remaining inconsistency in the ordinance with respect to the treatment of sports and recreation facilities. For purposes of this preliminary

1. Equal Protection

The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). "Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs on a larger, neutrally defined group; it cannot pick on just the most vulnerable." *LC & S, Inc. v. Warren County Area Plan Comm'n,* 244 F.3d 601, 603 (7th Cir. 2001). The Supreme Court has established the following standards for determining the validity of state legislation, such as zoning codes, under the Equal Protection Clause:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect classifications such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the

---

injunction, the Court credits the Village's explanation that its failure in April 2003 to preclude sports and recreation facilities in the I-1 district was merely an oversight in drafting which it sought to remedy in the June 2003 amendment. Def. Post-Trial Mem., p. 5; Tr. 361-67.

> classifications challenged be rationally related to a legitimate state interest.

City of New Orleans v. Dukes, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976).

If the legislative classification negatively affects such a suspect class, then courts may uphold the classification only if it is "precisely tailored to serve a compelling governmental interest." *Sklar v. Byrne,* 727 F.2d 633, 636 (7th Cir. 1984) (quoting *Plyler v. Doe,* 457 U.S. 202, 216-17, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)). Absent an invidious or gender-based classification, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne,* 473 U.S. at 440. With respect to equal protection challenges in the municipal land use context, the Seventh Circuit Court of Appeals has stated: "Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives.'" *Forseth v. Village of Sussex,* 199 F.3d 363, 370-71 (7th Cir. 2000).

Petra's Equal Protection Clause argument is based on the Village's 1988 Code, which allowed non-religious membership organizations to operate in the I-1 district with a special permit but prohibited religious organizations from doing so. Pl. Mem., pp. 5-6; Pl. Post-Trial Mem., pp. 10-11. *See, e.g., Vineyard,* 250 F. Supp. 2d at 976-77 (ordinance that permitted cultural and membership organizations within the O1

District but excluded religious organizations classified on the basis of religion). As amended, however, the Village's zoning code treats all religious and non-religious organizations the same with respect to the I-1, commercial, and office districts. In fact, religious organizations are treated more favorably than non-religious organizations in residential districts, where churches are allowed either as of right or by special permit but other membership institutions are not allowed at all. Tr. 311-12, 327-28.

In *C.L.U.B. v. City of Chicago,* 157 F. Supp. 2d 903 (N.D. Ill. 2001), a Chicago ordinance permitted clubs, lodges, meeting halls, recreation buildings, and community centers to locate in business and commercial districts as of right, but required churches to obtain a special use permit. *Id.* at 906. In response to the litigation, the city amended the ordinance to require that all of the entities, and not just churches, obtain a special use permit. In a subsequent ruling on summary judgment, the court applied the rational basis test, noting that the amended ordinance treated similar uses the same. *Id.* at 912. The Seventh Circuit Court of Appeals recently affirmed this decision, including the court's rational basis analysis. *Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *10 (declining to apply heightened equal protection scrutiny because "whatever obstacles that the [zoning code] might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs"). Following this rationale, the Village need only show a rational basis for the zoning code.

In amending the zoning code, the Village determined that churches are better suited for residential areas, and that membership organizations are not well-suited for industrial districts. Def. Mem., p. 5; Def. Post-Trial Mem., p. 16; Tr. 544-46. Thus, religious institutions are now permitted as of right in two residential districts, which arguably "recognizes the historical connection between strong and healthy residential communities and churches." *C.L.U.B.*, 157 F. Supp. 2d at 911-12; *Civil Liberties*, 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *10. In addition, religious institutions are allowed in commercial and office districts with a special permit. This allows exceptions to the general rule that business and commerce may be hindered by non-commercial uses. *Id.* at 912; *Civil Liberties*, 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *10.

The Court recognizes that many other membership organizations remain in the I-1 districts despite the Village's stated safety concerns. However, these legal, nonconforming uses will presumably be eliminated over time. *See Littlejohn v. City of North Chicago*, 259 Ill. App. 3d 713, 721, 631 N.E.2d 358, 364, 197 Ill. Dec. 355 (1994) ("the spirit and intent of zoning is to restrict and eventually eliminate nonconforming uses") (internal quotation omitted). And Petra has not shown that the Village's action in excluding all membership organizations from the I-1 district rather than including religious organizations was "wholly impossible to relate to legitimate governmental objectives." *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 282 (7th Cir. 2003) (quoting *Forseth*, 199 F.3d at 371). As noted, churches are now treated the same as other non-religious

organizations in I-1, commercial and office districts, and treated more favorably in residential districts. Thus, Petra has not shown a reasonable likelihood of success on its equal protection claim. *See Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *10(no equal protection violation where churches "fare better than many other nonreligious assembly uses that are treated equally in B, C, and M districts but excluded from R districts" that allow churches as of right).

2. Free Speech

Petra next claims that the Village's zoning code violates the congregation's right to free speech by excluding churches from the I-1 district. Cmplt. P31. The first question is whether a zoning code that limits the location of religious institutions regulates speech potentially protected by the U.S. Constitution or merely non-expressive conduct. Neither party has addressed this issue. *Compare C.L.U.B.,* 157 F. Supp. 2d at 915 (denying free speech challenge to zoning ordinance on grounds that "operation of a house of worship does not equate with 'religious speech' any more than the operation of a shoe store equates with commercial speech"), with *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 468-71 (8th Cir. 1991) (zoning ordinance regulated speech because the "religious content of the [zoning] applicant's speech can determine whether the City permits it to locate in the [challenged] zone").

Assuming that the zoning code, which excludes both religious and non-religious membership organizations from the I-1 district, incidentally

regulates speech within churches, it is content neutral because it is "motivated not by any disagreement ... with the message conveyed by church speech or assembly, but by such legitimate, practical considerations as the promotion of harmonious and efficient land use." *Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *9. Significantly, Petra has presented no evidence to suggest that the zoning code's purpose is to restrict religious speech in any way. In addition, the zoning code is narrowly tailored to serve a legitimate governmental objective. *See Ward v. Rock Against Racism,* 491 U.S. 781, 782, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). "There is no question that [Northbrook] - like any other population center - has a substantial interest in regulating the use of its land and that the [zoning code] promotes that interest." *Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *9. Churches may freely disseminate religious speech in approximately 70 percent of Northbrook's area, either as of right or with a special permit. On these facts, it is not reasonably likely that Petra's free speech challenge will succeed.

3. Free Exercise

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const., amend. I. Petra argues that the zoning code violates its right to free exercise of religion under the U.S. Constitution because Petra cannot conduct worship services or a variety of other religious activities at the Property. Pl. Mem., p. 8. The Free Exercise Clause, which applies to the states by incorporation into the Fourteenth Amendment, "prohibits local governments from making

discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest." *C.L.U.B.*, 157 F. Supp. 2d at 914 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993)). *See also Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). Under *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Under *Lukumi*, a law is not "neutral" if "the object of [the] law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. Before considering whether a law is neutral and/or generally applicable, however, a court must determine whether the law substantially burdens religious exercise. *Vineyard*, 250 F. Supp. 2d at 985 (citing *Lukumi*, 508 U.S. at 531).

Petra claims that it suffers considerable burden and expense by having to rent space from another church in order to conduct its worship services, baptisms, weddings, confirmations, communions, and youth activities. Pl Mem., pp. 8-9. However, a zoning code that merely restricts the location of religious practice and conduct does not substantially burden the free exercise of religion. *Vineyard*, 250 F. Supp. 2d at 986-87 (such "monetary and logistical burdens do not rise to the level of a substantial burden on [Petra's] constitutional free exercise rights"). Significantly, Petra can locate in two residential districts as of right

and 16 additional districts with a special permit, comprising approximately 70 percent of the Village's geographic area. Tr. 316. "When churches are permitted in some municipal zoning areas but not others, a congregation does not have a constitutional right to build its house or worship in any area it chooses." *Vineyard,* 250 F. Supp. 2d at 986.

Petra argues that the zoning code "unreasonably limits religious assemblies by relegating them to areas that are already built up and not suitable for large (100+) groups." Pl. Mem., p. 7, n.3; Pl. Post-Trial Mem., p. 14. But like many other cities in the Chicagoland area, Northbrook as a whole is largely developed. Tr. 450. Petra has not cited any cases suggesting that churches can locate wherever they want if a city does not have much vacant land available. And though Petra clearly spent a significant amount of time and money searching for a suitable property, retaining legal advice and applying for permits, there is no evidence that non-religious membership organizations would not face similar expenses as well. "Whatever specific difficulties [Petra] claims to have encountered, they are the same ones that face all rentors, not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *C.L.U.B.,* 157 F. Supp. 2d at 915 (quoting *Love Church v. City of Evanston,* 896 F.2d 1082, 1086 (7th Cir. 1990)). *See also Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *6 ("the scarcity of affordable land ... along with the costs, procedural requirements, and inherent political aspects of the [zoning] approval processes ... are incidental to any

high-density urban land use ... and do not amount to a substantial burden on religious exercise").

Petra speculates that it cannot find properties within the R-1 and R-2 districts which could accommodate its 175 congregants. Pl. Facts PP73-75; Pl. Post-Trial Mem., p. 14. However, it has not made a sufficient showing that it even looked for properties in such districts, or that it could not find suitable properties in any of the 18 other residential, commercial and office districts available by special permit. Nor has it presented evidence demonstrating that the mere fact that the church could not find a property the exact same size as 3005 MacArthur means that it has been unlawfully excluded from the Village. Poupard testified that the Village amended the zoning code in order to make it easier for churches to locate in Northbrook, not to burden religious practices. Tr. 326-28. Indeed, Petra's members concede that the Village has not prevented them from worshiping or interfered with the content of their religious practices in any way. Tr. 68-69, 70, 113. *See Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *7 ("nothing in the record suggests, nor do Appellants articulate in anything but conclusory terms, that the object and purpose of the [zoning code] is anything other than those expressly stated therein"). At this stage of the proceedings, Petra has not demonstrated a reasonable likelihood of success on its free exercise claim.

4. RLUIPA

In addition to these constitutional arguments, Petra also claims that the Village's zoning code

violates RLUIPA by excluding churches from the I-1 district and by treating them differently than non-religious organizations. The Village maintains that the statute has not been violated and that it is unconstitutional. Def. Mem., pp. 14-15. The Village moved to withdraw its constitutional objection to RLUIPA for purposes of preliminary injunction, but the Court need not reach that issue in any event because Petra has not made a sufficient showing that the zoning code violates the statute.

RLUIPA provides that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Sections (b)(1) and (b)(3) of the statute further protect religious assemblies and institutions from discrimination and exclusion, respectively. As a preliminary matter, the Court notes that Petra has not cited a single case relating to RLUIPA or the proper analysis of such claims. In addition, Petra argues a violation of Section (a) of the

statute but does not allege such a claim in its complaint, focusing instead on the Village's alleged violations of Sections (b)(1) and (b)(3). Pl. Mem., p. 9. In any event, the Court first addresses whether Petra has shown a substantial burden on its religious exercise.

Petra cannot demonstrate a reasonable likelihood of success on a Section (a) claim for the same reasons it could not do so for its Free Exercise Clause claim. The Seventh Circuit recently held that "in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable." *Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *5. And as discussed earlier, the difficulties encountered by Petra do not amount to a substantial burden on religious exercise. Petra has continued to hold worship services and is allowed to locate in 18 of 24 districts in the Village.

> Although [Petra] has undoubtedly suffered serious hardships, first in its attempt to find a suitable property, and, once it found one at [3005 MacArthur], in attempting to win approval for the intended uses, the court holds that the [Northbrook] zoning ordinance does not constitute a substantial burden on the exercise of religion, and therefore Section (a)(1) has not been violated.

Vineyard, 250 F. Supp. 2d at 991-92.

Petra's equal treatment and exclusion claims suffer from similar deficiencies. Section (b)(1) of RLUIPA prohibits a government from treating religious assemblies or institutions on "less than equal terms with a nonreligious assembly or institution." Section (b)(3) states that a government may not "totally exclude" or "unreasonably limit" religious assemblies or institutions from a jurisdiction. These provisions codify existing Equal Protection Clause and Free Exercise Clause jurisprudence. *See Freedom Baptist Church of Delaware County v. Township of Middletown,* 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002) (Sections (b)(1) and (b)(3) of RLUIPA "codify existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment"); *Ventura County Christian High Sch. v. City of San Buenaventura,* 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002).

As amended, the zoning code treats religious and non-religious membership organizations on equal terms by excluding both from the I-1 district. Petra claims that churches are treated less favorably than restaurants and bars, which are still allowed in the I-1 district. Pl. Post-Trial Mem., p. 11. However, all other non-religious membership organizations are also treated "less favorably" than restaurants and bars, and Petra has not cited any authority indicating either that restaurants and bars are "similarly situated" assembly uses or that this is sufficient to constitute a violation of RLUIPA. *See Ventura County Christian High Sch.,* 233 F. Supp. 2d at 1246-47 ("in evaluating plaintiffs claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the

Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities").

As for the exclusion claim, Petra has not presented sufficient evidence that it is unreasonably limited in its ability to find property within the Village to accommodate its 175 congregants. Indeed, religious institutions are allowed as of right and by special permit in approximately 70 percent of Northbrook's area. Petra claims that the zoning code "contravenes Illinois law by requiring the applicant for a special use permit to prove that the proposed use is compatible in the district." Pl. Post-Trial Mem., p. 11. However, Poupard testified that the Village presumes a special use is valid, in accordance with Illinois law. Tr. 321-22, 331-32. *See, e.g., City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 196 Ill.2d 1, 21, 749 N.E.2d 916, 929-31, 255 Ill. Dec. 434 (2001) ("because special uses, as such, are considered compatible with other uses in the zoning district in which they are included, it is generally held that an application for a special use permit may not be denied on the ground that the use is not in harmony with the surrounding neighborhood").

Petra also claims that the zoning code improperly excludes churches from the Village by not allowing a property owner "ever to reapply for a special use permit if the Trustees have once denied its application, unless the property owner can prove changed circumstances." Pl. Post-Trial Mem., p. 11. Once again, Petra cites no authority indicating that such a provision, which applies to all property owners and not just churches, violates RLUIPA. *See, e.g.*, 146 Cong.

Rec. S7776 (daily ed. July 27, 2000) (RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay"); *Civil Liberties,* 2003 U.S. App. LEXIS 17046, 2003 WL 21977001, at *6 (RLUIPA does not require governments to favor religious land uses "in the form of an outright exemption from land-use regulations"). Moreover, Petra withdrew its application before the Village Board ever voted on it, and never once mentioned RLUIPA during that process or during the proceedings to amend the zoning code. And RLUIPA would constitute a changed circumstance allowing reconsideration of Petra's application. Tr. 548.

In sum, Petra has not demonstrated a substantial burden on its religious exercise, unequal treatment or unlawful exclusion from the Village. Thus, Petra has not shown a reasonable likelihood of success on any of its RLUIPA claims.

5. Vested Right

Petra claims that even if the 2003 Code is valid and constitutional, the congregation nonetheless has a vested right in obtaining the appropriate permits to use the Property as a church.[4] To establish a vested

---

[4] Petra claims that "it may be inferred that Illinois' vested rights doctrine is grounded in the Due Process Clause of the United States Constitution and the Illinois Constitution," relying on a

right to a zoning certificate, Petra must demonstrate that: (1) it made expenditures or incurred obligations "in good faith reliance on the probability that it would obtain a zoning certificate and a building permit pursuant to the current zoning ordinance"; and (2) those expenditures and obligations were substantial. *1350 Lake Shore Assocs. v. Mazur-Berg,* 339 Ill. App. 3d 618, 791 N.E.2d 60, 73, 274 Ill. Dec. 264 (2003). "A probability that approval is forthcoming exists when the property at issue is zoned to permit the use requested by the landowner." *Id.* (quoting *Bank of Waukegan v. Village of Vernon Hills,* 254 Ill. App. 3d 24, 31, 626 N.E.2d 245, 193 Ill. Dec. 212 (1993)). *See also People ex rel. Shell Oil Co. v. Town of Cicero,* 11 Ill. App. 3d 900, 905, 298 N.E.2d 9, 12 (1973) ("a 'probability' that a building permit will issue is present where the subject site ... is suitably zoned to permit construction of the type of building and use thereof contemplated by the party"). However, "expenses which a property owner incurs with knowledge that an amendatory ordinance, pursuant to which the intended use would not be permitted, is pending, are not incurred in good faith reliance on the probability that a zoning certificate ... will issue." *1350 Lake Shore Assocs.,* 791 N.E.2d at 74.

1927 New York state case, which is cited in a 1958 Illinois Supreme Court case that nowhere mentions either constitution. Pl. Post-Trial Mem., p. 12. The Court disagrees that any such inference can be drawn from these cases, and Petra's discussion of this claim does not include any due process analysis. Thus, the Court will analyze the vested rights claim as a state law theory of relief.

Petra's primary argument in support of its vested rights claim is that the 1988 Code's prohibition of religious uses in the I-1 district was "null and void" and that Petra "was authorized to use its property as a church, and it could make its substantial expenditures in reasonable expectation of getting a building permit." Pl. Post-Trial Mem., p. 5. But once again, Petra does not cite a single case in support of this assertion. *See Pacific Tall Ships,* 102 F. Supp. 2d at 924-25 ("we address only those [arguments] that are fully developed and supported by relevant case law"); *LINC Finance Corp. v. Onwuteaka,* 129 F.3d 917, 921-22 (7th Cir. 1997) ("this court has no duty to research and construct legal arguments available to a party") (citation omitted). As explained earlier, Petra's singular reliance on *Carter* is misplaced because that case merely held that where a city failed to follow statutory procedures required to enact a zoning ordinance, it was null and void. 773 F.2d at 254. Here, Petra makes the novel and unsupported assertion that a zoning provision it believes is unconstitutional is automatically void absent any legal determination to that effect.

Petra has arguably made substantial expenditures with respect to the Property, but it has failed to show that such expenditures were made in good faith reliance on the probability of obtaining the appropriate permits. "The vested rights doctrine is grounded in the desire to avoid the 'grave injustice' of allowing municipal officials to deny development rights by changing the rules in the middle of the game." *International College of Surgeons v. City of Chicago,* 1994 U.S. Dist. LEXIS 18989, 1995 WL 9243, at *19 (N.D. Ill. Jan. 9, 1995). Here, Petra knew that the

Property was never zoned to permit its requested use, and it knew that the Board likely was going to deny its request for rezoning before it even purchased the Property. Indeed, Petra could not have reasonably believed that it would obtain rezoning when it withdrew its rezoning application before the Board ever voted on it.

Contrary to Petra's assertion, the mere fact that it filed this lawsuit challenging the zoning code does not demonstrate a probability of obtaining rezoning or building permits, or Petra's good faith reliance on any such probability. Pl. Post-Trial Mem., pp. 4-5. At best, it demonstrates an unresolved question as to permitted uses in the I-1 district as of the date the lawsuit was filed. *See, e.g., International College of Surgeons,* 1994 U.S. Dist. LEXIS 18989, 1995 WL 9243, at *19 (vested rights doctrine does not apply "where there is an unresolved question over what may be built under the land-use regulations"). Significantly, Petra never raised any constitutional or statutory objections during its zoning application process, and never went back to the Board for a final determination on its application after filing the lawsuit.

Petra has not shown any grave injustice sufficient to apply the vested rights rule and, thus, it has not met its burden of showing a reasonable likelihood of success on this claim. *Bank of Waukegan,* 254 Ill. App. 3d at 33, 626 N.E.2d at 252 ("the rationale behind the vested rights rule [is] preventing grave injustice").

6. Legal, Nonconforming Use

For similar reasons, Petra has not shown a reasonable likelihood of success on its claim that the congregation is entitled to use the Property as a church because "the Church's religious exercise at 3005 MacArthur has become, at the least, a legal nonconforming use, which may not be abrogated." Pl. Mem., p. 11. "A legal nonconforming use is a use that is not permitted under the current zoning ordinance but is allowed to continue because it predates the ordinance." *City of Marengo v. Pollack,* 335 Ill. App. 3d 981, 986, 782 N.E.2d 913, 917, 270 Ill. Dec. 354 (2002). "[A] use that was not lawful at its inception is not a legal nonconforming use and therefore may be eliminated if it violates the current zoning ordinances." *Id.*

The Village argues that Petra cannot establish a legal, nonconforming use of the Property because it never actually used the Property for religious assembly. Def. Mem., pp. 10-11; Def. Post-Trial Mem., pp. 6-7. Generally, "an owner is entitled to the protection of a legal nonconforming use if the property is in actual use, as distinguished from a merely contemplated use, when the zoning restriction becomes effective." *Bainter v. Village of Algonquin,* 285 Ill. App. 3d 745, 751, 675 N.E.2d 120, 125, 221 Ill. Dec. 213 (1996) (citing *DuPage County v. Elmhurst-Chicago Stone Co.,* 18 Ill.2d 479, 484, 165 N.E.2d 310, 313 (1960)). In this case, Deacon Lee, Pastor Kim and Elder Kim all testified that Petra has been using 3005 MacArthur for prayer meetings, bible studies and choir practices since it closed on the property in October 2001. Tr. 49-51, 52-53, 90-93, 94-95, 166-68, 185. For

purposes of this motion for preliminary injunction, Petra has sufficiently demonstrated actual use of the Property for religious assembly.

The Village next argues that Petra failed to exhaust its administrative remedies with respect to the Village because it withdrew its zoning application prior to a final Board decision. Def. Mem., pp. 12-13; Def. Post-Trial Mem., pp. 8-10. To the extent Petra is challenging the facial validity of the zoning code, however, it is not required to exhaust its administrative remedies. *See Van Harken v. City of Chicago,* 305 Ill. App. 3d 972, 977, 713 N.E.2d 754, 758, 239 Ill. Dec. 223 (1999) ("if the complaint attacks the constitutionality of a statute or ordinance on its face, the plaintiff need not exhaust all of his administrative remedies before seeking judicial relief"); *Zebulon Enterprises, Inc. v. DuPage County,* 146 Ill. App. 3d 515, 520, 496 N.E.2d 1256, 1259, 100 Ill. Dec. 191 (1986) ("the exhaustion requirement is inapplicable ... where the property owner challenges the constitutionality of the ordinance on its face or in its terms").

More problematic for Petra is the fact that its use of the Property for religious assembly did not predate the 1988 Code and was never permitted under that code. As noted earlier, Petra has cited no competent authority for its proposition that the zoning code's prohibition of religious uses in the I-1 district was "null and void" or that its use of the Property for religious purposes was automatically "legal" absent any judicial determination to that effect. Pl. Mem., pp. 5, 11; Pl. Post-Trial Mem., pp. 6, 7. *See, e.g., Forest Preserve Dist. of DuPage County v. Brown Family*

Trust, 323 Ill. App. 3d 686, 692, 753 N.E.2d 1110, 1115, 257 Ill. Dec. 484 (2001) ("an ordinance is presumed valid and ... the burden of establishing invalidity rests upon those who challenge the ordinance"); *Lovers Lane & Co. v. Village of Libertyville,* 128 F. Supp. 2d 1126, 1127 (N.D. Ill. 2000) ("in general, a zoning ordinance is presumed to be constitutionally valid").

Petra never sought a permit to conduct meetings, youth groups, choir practices or any other organizational activity that was arguably allowed in the I-1 district under the 1988 Code, though such a permit was required of all membership organizations. Nor did Petra ever attempt to obtain the necessary building code permits for such uses. And as noted, Petra knew when it bought the Property in October 2001 that its proposed use was not allowed in the I-1 district, and it withdrew its rezoning application without ever mentioning any constitutional or statutory concerns. For purposes of preliminary injunction, Petra has not demonstrated a reasonable likelihood of success in establishing a legal, nonconforming use of the Property. *See Lake County v. Zenko,* 174 Ill. App. 3d 54, 65-66, 528 N.E.2d 414, 421, 123 Ill. Dec. 869 (1988) ("the burden of proving that [its] use of property fell within the exception to the application of the zoning ordinance for legal nonconforming uses was [Petra's] burden"); *City of Chicago v. Westphalen,* 95 Ill. App. 2d 331, 338, 238 N.E.2d 225 (1968) ("[a] party wishing to benefit by an exception must prove that he comes within it").

B. Irreparable Harm/Inadequate Remedy at Law

Having determined that Petra presented insufficient evidence of a reasonable likelihood of success on the merits of its constitutional, statutory and state law claims, the Court need not address the remaining factors in the preliminary injunction test. *Clemens v. Peters,* 69 F.3d 539 (7th Cir. 1995) (citing *Curtis v. Thompson,* 840 F.2d 1291, 1297 (7th Cir. 1988)) ("the denial of a motion for a preliminary injunction may be based solely on plaintiff's failure to establish a negligible chance of success on the merits"). Nevertheless, the Court notes that Petra has failed to meet its burden of establishing irreparable harm or an inadequate remedy at law.

Irreparable harm is harm that cannot be compensated by money damages. *Graham v. Medical Mut. of Ohio,* 130 F.3d 293, 296 (7th Cir. 1997) ("the injury must be of a particular nature, so that compensation in money cannot atone for it") (internal quotations omitted). Petra's only argument in support of this requirement is that the deprivation of a constitutional right, even if temporary, constitutes irreparable harm. Pl. Mem., p. 13 (citing *Elrod v. Burns,* 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)). Given that Petra has failed to establish a reasonable likelihood of success on any of its constitutional or statutory claims, it has also not shown any irreparable harm to support a preliminary injunction.

CONCLUSION

For the reasons stated above, Petra's motion for preliminary injunction (Docket Entry # 3-2) should be denied. In addition, The Village's Motion to Withdraw Constitutionality Challenge Without Prejudice (Docket Entry # 17-1) should be denied as moot, and Petra's motion to have the Court drive by the Property (Docket Entry # 13-1) should also be denied.

Counsel has ten days from the date of service of this Court's Report and Recommendation to file objections with the Honorable Blanche M. Manning. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Lorentzen v. Anderson Pest Control,* 64 F.3d 327 (7th Cir. 1995).

NAN R. NOLAN

United States Magistrate Judge

Dated: August 28, 2003

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-1329

[Filed July 3, 2007]

PETRA PRESBYTERIAN CHURCH,
Plaintiff-Appellant,

v.

VILLAGE OF-NORTHBROOK,
Defendant-Appellee.

Before Hon. Richard A. Posner, Circuit Judge, Hon. Terence T. Evans, Circuit Judge, Hon. Diane S. Sykes, Circuit Judge.

ORDER

On June 21, 2007, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX E

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX F

106th CONGRESS

2d Session

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-
(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling interest.
(2) SCOPE OF APPLICATION- This subsection applies in any case in which--
(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-
(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--
(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

* * *

APPENDIX G

VILLAGE OF NORTHBROOK ZONING CODE
Article XI Zoning Administration and Enforcement

§ 11-302 Successive Applications

* * *

11-302 SUCCESSIVE APPLICATIONS

11-302 A. Second Applications Without New Grounds Barred. Whenever any application filed pursuant to this Code has been finally denied on its merits, a second application, seeking essentially the same relief, whether or not in the same form or on the same theory, shall not be brought unless, in the opinion of the Officer, Board or Commission before which it is brought, substantial new evidence is available or a mistake of law or fact significantly affected the prior denial.

11-302 B. New Grounds to be Stated. Any such second application shall include a detailed statement of the grounds justifying consideration of such application.

11-302 C. Exception. Whether or not new grounds are stated, any such second application filed more than two years after the final denial of a prior application shall be heard on the merits as though no prior

application had been filed. The applicant shall, however, be required to place in the record all evidence available concerning changes of conditions or new facts that have developed since the denial of the first application. In the absence of such evidence it shall be presumed that no new facts exist to support the new petition that did not exist at the time of the denial of the first application.

* * *

APPENDIX H

VILLAGE OF NORTHBROOK ZONING CODE APPENDIX B MASTER LAND USE TABLE

[SEE FOLDOUT PAGE FOR VILLAGE OF NORTHBROOK ZONING CODE]

APPENDIX I

An Analysis of the Impact of Borrowed Facility Usage for Churches With Specific Application to Petra Presbyterian Church

Prepared by Thom S. Rainer, Ph.D.
President, The Rainer Group
Louisville, Kentucky
And
Dean, The Billy Graham School of Missions, Evangelism and Church Growth
The Southern Baptist Theological Seminary
Louisville, Kentucky

February 7, 2005

Statement of the Issue

The purpose of this analysis is to present the impact on churches when they are forced to use borrowed facilities as their primary place of worship and ministry usage. In this report, "borrowed facilities" refers to buildings, parking places, and related physical areas that are primarily used by an owner church, and then are secondarily used another church that has no ownership interest in the subject property. The owner church is called the "primary church," and the church borrowing the facilities is called the "secondary church."

This type of facility usage fits within a broad category sometimes called "innovative facility usage," "alternative facility usage," or "adaptive re-usage." All of these categories refer to a church's usage of facilities other than a traditional location where the church owns property. Some churches rent movie theaters; others lease school buildings; and even others share usage with a church that owns the property. It is the last category that concerns us for this study.

The distinguishing feature of churches that use borrowed facilities is that they must always yield to the needs of the owner church. If a church leases a movie theater, for example, that church can still hold services at a "prime" time on Sunday morning. The same reality would hold true for churches leasing school buildings. The secondary church, however, can only use the facilities after the primary church has taken the prime time.

Though precise counts are impossible, we estimate that there are 400,000 churches in the United States. Of these 400,000 churches, an estimated 5% or 20,000 churches hold services in alternative facilities. About 2,000 churches (½ of 1%) are utilizing borrowed facilities, and most of these churches view the arrangement as temporary and short-term.

Basis of Study

This study utilizes several sources of information and experience. Seven of those sources are noted below.

1. Rainer Group consultations. In 1986 I started a company named Church Growth Visions. The company name changed to The Rainer Group in 1996. The primary purpose of this company is to provide consultation services to churches, denominations, and Christian-related organizations.

Our company has consulted with nearly 600 churches. The nature of these consultations varies with the church's needs, and the length of the consult can range from one day to a year or more.

In the course of these consultations, we have seen almost every conceivable situation in a plethora of churches. This experiential knowledge gained in these relationships is a primary source of information for this report and analysis.

2. Training of other consultants. In 2002 I entered into ownership with a company called Church Central Associates. One of the primary purposes of Church Central has been to train and certify other church consultants. Today Church Central is one of the largest church consultation training firms in the world.

Though I am the primary instructor for these training courses, I benefit greatly from the experiences and case studies of those who attend the sessions. I am thus not limited to my own experiences in analyzing church situations and needs.

3. Writings related to the church. I am considered by many to be most prolific writer on the state of the American church. I have written 14 books and

hundreds of articles. The research behind these writings provides me further insights into critical issues related to the church. That research informs all the conclusions and analysis in this particular report.

4. Research. I serve as chairman of Rainer Research, a division of the Rainer Group. This research is conducted for outside clients and well as for publications authored or co- authored by me. The research has been published in over 30 magazines, journals, and books. In addition, the research has been cited in thousands of articles and books. This detailed research is another critical source of information for this report.

5. Pastoral ministry. Prior to accepting the position of dean at the Southern Baptist Theological Seminary eleven years ago, I served as senior pastor of four churches in Indiana, Kentucky, Florida, and Alabama. In addition I have served as interim pastor in eight churches since coming to serve as dean of the seminary. My work as a consultant, author and researcher has thus been enhanced by 21 years of pastoral experience. This experience has been vital in my comprehension of the health of churches in America today.

6. Speaking. I speak in some 200 venues a year. These speaking engagements allow me to have a "laboratory" to express and test theories. The interaction I have with participants has been immensely helpful in my understanding of the church, and the application of this particular report and situation.

7. Secondary sources. Of course, I am not the only person well-versed on the health of the American church. I am grateful for the writings and works of so many church growth and church health experts: Lyle Schaller; Glen Martin; Gary McIntosh; Rick Warren; William Easum; Chuck Lawless. Elmer Towns; Kennon Callahan; C. Peter Wagner; and many others. As a voracious reader on the church, I am grateful for the insights of these other authors and researchers. Their works are also used to inform this report on Petra Presbyterian Church, the specifics to which we now turn.

Specificity of the Issues Related to Petra Presbyterian Church

When examining the impact of facilities on a particular church, we view three specific groups of data as critical: timelines; attendance trends; and financial trends. Timelines point to major events or developments in the church. Attendance indicates the involvement of members and guests in the growth or decline of the church. Financial trends typically indicate the level of commitment of the members of the church.

The data related to Petra Presbyterian Church demonstrate a clear pattern:

Date	*Est. Attendance*	*Income*	*Event*
1994	New	NA	Church began
1996	100	NA	Early growth
1998	110	NA	Began using Lutheran Church
2000	130	$210,400	Attendance peak
2001	130	$368,800	Expectation of entering newly-purchased facility at Northbrook (purchased October 2001
2003	NA	$440,700	Income peak
2004	80	$259,200	Decline related to inability to enter Northbrook facility

The pattern above is a classic build-up/decline scenario related to facilities. The church began with significant growth and excitement the first several years after its birth. Attendance increased steadily to 2001 and, even more dramatically, income showed a rapid upward trajectory.

With the purchase of the Northbrook facility in late 2001, the church had high hopes of entering it own building. Income continued to rise through 2003, most likely due to the anticipation of needs to fund the

church in its own location. After a few years of failure to get permission to enter the facility, however, the income and the attendance began to decline.

It is possible to do a reasonable projection of what the financial realities of the Petra Presbyterian Church would have been had the congregation been given authority to enter its own facilities in early 2002. The assumptions for these projections are based on the clear trends already evident in the church.

1. In 2003 weekly per capita giving was $63.89. Weekly per capita giving refers to the average financial contribution of each attendee, from babies to the oldest adults, each week. It is a standard measurement in church consultations in the United States.

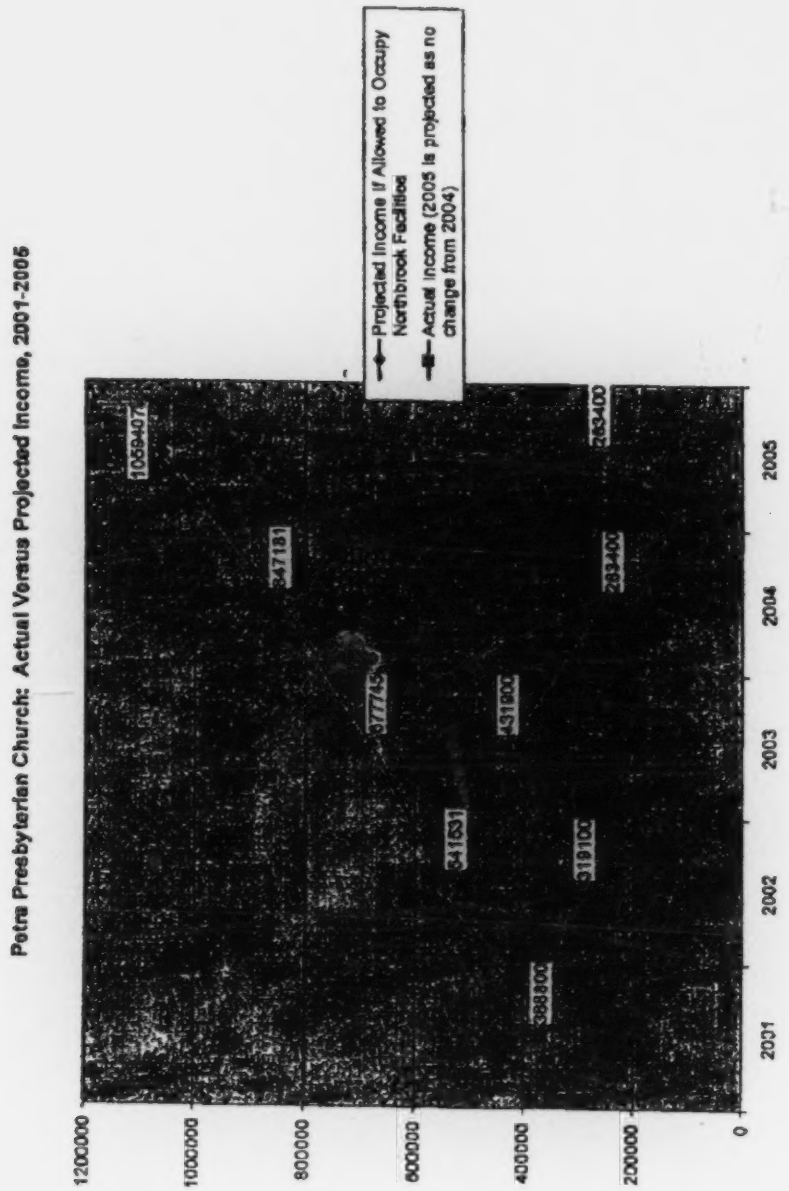
2. Attendance reached 100 in 1996 and 130 in 2000. This healthy growth pattern took place despite the limitations of borrowed facilities. Based upon this early growth years, we can reasonably assume a 25% annual attendance growth rate had the church been allowed to enter its own facilities in 2002. The projected attendance is:

2001 (actual)	130
2002	163
2003	204
2004	255
2005	319

3. Our next step in these projections is to apply the weekly per capita giving of $63.89 for each

of the years projected above. We are thus able to determine a reasonable financial projection had Petra been in its own facilities by January 2002.

4. We can also show actual income as a point of comparison to the projections for 2002 to 2005. The 2005 "actual" numbers are in fact projections themselves. We simply projected no change from 2004.



The impact of Petra's inability to occupy its purchased facilities in Northbrook has been dramatic. *Our projections show that in just four years, 2002 to*

BEST AVAILABLE COPY

2005, the church has lost $1,847,884 in income. In 2005 the lost income is estimated to be $20,373 per week.

Why are facilities so important in the health, particularly the financial health, of a church in the United States? Specifically, why are borrowed facilities detrimental to a church beyond a short time frame of two to three year? Our research and experience has found at least eleven reasons. To those reasons we now turn.

Reasons for the Negative Impact of Borrowed Facilities Beyond a Short Time Frame

Most churches will have modest to good growth in borrowed facilities, all other factors being equal, for a time frame of two to three years. Beyond that point, the inconveniences and frustrations of not having unique facilities begin to accumulate. Some of the reasons include:

1. *Borrowed facilities cannot be used to the fullest.* A church owning its facilities, for example, may see the need to remove a non-load-bearing wall to accommodate greater growth. Or a church may decide to paint the rooms of its preschool area attractive and bright colors to attract young families. None of these options are available if a church is a secondary user of the facility. Rarely can such a church make any changes to the facilities to accommodate its own needs and growth.

2. *Churches do not have a clear identity with borrowed facilities.* Most churches that are secondary users of a facility cannot place a permanent sign to identify its property. If they are allowed to do so, it is typically a small sign that is overshadowed by the primary user. Similarly, members of the secondary-user church can only invite guests by saying "We are meeting at another church." In the case of Petra, the members must always identify their location as "the Lutheran church."

3. *Churches using borrowed facilities often have confusing demographics.* In the specific case of Petra, the borrowed Glenview facility is approximately ten miles from the Northbrook location. In a metropolitan area, the demographics of the communities tend to shift dramatically in just five miles. What therefore is the primary community Petra should attempt to reach and serve? Does it include the present and borrowed facility or the new facility? Should they invite close neighbors of the Glenview location if those same persons would be unlikely to attend the Northbrook location?

4. *Members of a borrowed facility are likely to become demoralized after two to three years.* The demographic issue cited above is but one reason that church members become discouraged without their own facilities. The members of a church in the situation of Petra always have a sense of second-class membership because they have so many limitations in a borrowed facility. Members are likely to endure the hardships of

such an arrangement if the prospects of relocating to their own facilities are near-term. Once the borrowed arrangement begins to have a more permanent feel to it, discouragement is likely to occur.

5. *Churches cannot make long-term strategic decisions in borrowed facilities.* Strategic planning involves understanding the community of the church in detail. It involves facility additions and changes necessary to meet growth demands. Strategic plans must include definitive expectations of where a church will be located. None of these issues can be resolved in borrowed facilities.

6. *Borrowed facilities cannot be physically adapted.* As indicated in the first reason, churches cannot use such facilities to the fullest. Among the most detrimental of these disadvantages is the inability to adapt the physical property to meet the church's needs. Any physical changes to the church's property will be done by and for the primary user.

7. *The secondary church does not have priority use in a borrowed facility.* I recently did research on a Messianic Jewish congregation (Jews who believe that Jesus is the prophesied Messiah) that, like Petra, was using a Lutheran church as a secondary occupant. The congregation could never plan strategic community and outreach events at the church unless the calendar was clear. And typically the primary

church had use of the calendar at the most opportune times.

8. *Financial giving tends to be lower in churches in borrowed facilities.* One of the primary motives for financial giving in a church is the anticipation of worshipping in and utilizing owned facilities. Congregants give with the expectation that the funds will be used to purchase and/or renovate facilities. Once it becomes apparent that a move to an owned facility has become indefinitely delayed, giving tends to decrease.

9. *Outreach ministries cannot be strategically focused when a church is a borrowed facility.* One of the key avenues of chuch growth is outreach ministries which focus on the community surrounding the church. In the case of Petra and churches in similar situations, the area of community outreach is uncertain because the ultimate location is uncertain. Outreach ministries are thus deferred and delayed, resulting in diminished growth rates in the church.

10. *Churches have difficulty taking on a "personality" in a borrowed facility.* People are attracted to churches that have unique personalities, often reflected in the types of members, the styles of worship, the different ministries, and the facilities in which they are located. The latter issue, physical facilities, cannot be definitive in a situation such as Petra's.

11. *Contextualization is difficult in borrowed facilities.* Contextualization refers to the process by which a church adapts to its community, a critical issue if the church is to be a positive ministry force in its area. Of course, Petra cannot contextualize because its defined community is uncertain in its present scenario.

Summary: The Negative Impact of Utilizing Borrowed Facilities

Petra Presbyterian Church began in 1994 with high expectations. Those expectations were met or exceeded just two years later when the church was averaging approximately 100 in attendance. Growth slowed a bit, probably due to the constraints of utilizing borrowed facilities. But the most profound negative impact began to show in 2004 with dramatic declines in both attendance and income. I therefore conclude the following:

1. Petra Presbyterian Church had a beginning in 1994 that was much better than most church starts. Within only two years the church had an average attendance of 100, about the median size of all churches in the United States.

2. The church began to experience slower attendance growth after 2000. By this point Petra had been meeting in the Lutheran facilities for two years. We typically see churches began to see slower rates of growth after two to three years of utilizing borrowed facilities. Petra, however, did not have a significant decline in income until 2004. By this time the church had been in borrowed facilities for six years and had

been declined by the municipal authority to occupy its purchased property in Northbrook.

3. The church had expended considerable funds for a facility they were not allowed to occupy. A likely demoralization of the members of the church followed. Income and attendance dropped dramatically in 2004 as a result.

4. The financial damage to the church is clear and obvious as the graph in this report indicates. Our projections show that in just four years, 2002 to 2005, the church has lost $1,847,884 in income. In 2005 the lost income is estimated to be $20,373 per week. The cost of not being able to occupy the facility in Glenview is high and growing each day that occupancy does not take place.

Biographical Information for

Thom S. Rainer

Education

- Ph.D. the Southern Baptist Theological Seminary, 1988.
- M.Div. The Southern Baptist Theological Seminary, 1985
- B.S. *summa cum laude*, Business Administration, University of Alabama, 1977

Consultation Background

- President, the Rainer Group, 1988 to present
- President, American Association of Church Consultants
- Member, Society for Advancement of Consulting (a secular organization in which I am the only member providing church and denominational consultations).
- Member, American Consultants League (a secular organization in which I am the only member providing church and denominational consultations).
- President, Church Central Associates
- Consulted with over 500 churches

- Chairman of Rainer Research, an international church and denominational research firm

Publications

Books

- *The Unexpected Journey* (2005)
- *Breakout Churches* (2005)
- *The Unchurched Next Door* (2003)
- *Surprising Insights from the Unchurched* (2001)
- *High Expectation Churches* (1999)
- *The EveryChurch Guide to Growth* (co-author) (1998)
- *The Bridger Generation* (1997)
- *Encyclopedia of Evangelism and Church Growth* (co-editor) (1997)
- *Effective Evangelistic Churches* (1996)
- *Biblical Affirmations for Evangelism* (co-author) (1996)
- *Giant Awakenings* (1995)
- *Eating the Elephant* (1994)

- *The Book of Church Growth* (1993)

- *Evangelism in the Twenty-first Century* (1989)

Other

- Over 300 articles, chapters, and reviews

Academic Ministry

- Dean, Professor of Evangelism and Church Growth, The Billy Graham School of Missions, Evangelism and Church Growth, The Southern Baptist Theological Seminary, 1994 to present.

- Adjunct Professor of Evangelism and Church Growth, Beeson Divinity School, Samford University, 1990 to 1994.

- Associate Professor of Evangelism, Tampa Baptist Theological Seminary, 1988 to 1990

- Visiting Professor in numerous academic institutions

Pastoral Ministry

- Interim Pastor, First Baptist Church, Kettering. Ohio, 2003 to 2004

- Interim Pastor, First Baptist Church, Mount Washington, Kentucky, 2002 to 2003

- Interim Pastor, Northside Baptist Church, Indianapolis, Indiana, 2001 to 2002.

- Interim Pastor, Lakewood Baptist Church, Louisville, Kentucky, 2000 to 2001

- Interim Pastor, Bedford Baptist Church, Bedford, Kentucky, 1999 to 2000.

- Interim Pastor, Far Hills Baptist Church, Dayton, Ohio, 1997 to 1999

- Interim Pastor, Carlisle Avenue Baptist Church, Louisville, Kentucky, 1996 to 1997.

- Interim Pastor, Highview Baptist Church, Louisville, Kentucky, 1995 to 1996.

- Senior Pastor, Green Valley Baptist Church, Birmingham, Alabama, 1990 to 1994.

- Senior Pastor, Azalea Baptist Church, St. Petersburg, Florida, 1988 to 1990

- Senior Pastor, Hopewell Baptist Church, Louisville, Kentucky, 1986 to 1988.

- Senior Pastor, Hopewell Baptist Church, Madison, Indiana, 1984 to 1986.

Other

- Speaker in over 200 conferences, major speaking venues, and seminars around the nation each year

- Board of directors for two evangelical agencies

- Provided consultation to numerous periodicals including *USA Today, Time,* Associated Press, Religious News Service, and others

- Publisher of *Church Health Today,* a weekly church health newsletter

- Gold Medallion Finalist for two books

- Conducts over 20 radio and television interviews each year

- Noted by many as the world's leading authority on church health and church growth

- Recipient of over a dozen awards related to work in church health and church growth

77

(3)

No. 07-585

FILED
DEC 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PETRA PRESBYTERIAN CHURCH,
Petitioner,

v.

VILLAGE OF NORTHBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

JOHN W. MAUCK
Counsel of Record
RICHARD S. BELL
J. LEE MCCOY, JR.
NOEL W. STERETT
MAUCK & BAKER, LLC
ONE NORTH LASALLE STREET
CHICAGO, ILLINOIS 60602
(312) 726-1243

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF OF PETITIONER 1

TABLE OF AUTHORITIES

Cases

Civil Liberties for Urban Believers ("CLUB") v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 3, 5

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, et al.
--- F.3d ---, 2007 U. S. App. LEXIS 27390 (3rd Cir., Nov. 27, 2007) 6

Living Water Church of God v. Charter Township of Meridian, et al,
2007 U.S. App. LEXIS 28825, 2007 Fed. App. 0832N (6th Cir., Dec. 10, 2007) 1, 3, 5, 6

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 3

Midrash Sephardi v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004) 5

Rector, Wardens & Members of Vestry v. City of New York,
914 F.2d 348 (2d Cir. 1990) 4, 5

Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin,
396 F.3d 895 (7th Cir. 2005) 3

Vision Church v. Village of Long Grove,
468 F.3d 975 (7th Cir. 2006) 3, 5

Westchester Day School v. Village of Mamaroneck, et al.,
504 F.3d 338, 2007 U.S. App. LEXIS 24267 (2nd Cir. 2007) 1-4

SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Sup. Ct. R. 15(8), Petitioner submits this supplemental brief to bring to this Court's attention two new cases not available at the time of the party's last filing: *Westchester Day School v. Village of Mamaroneck, et al.*, 504 F.3d 338, 2007 U.S. App. LEXIS 24267 (2nd Cir. 2007), and *Living Water Church of God v. Charter Township of Meridian, et al*, 2007 U.S. App. LEXIS 28825, 2007 Fed. App. 0832N (6th Cir., Dec. 10, 2007)[1].

These cases further demonstrate the free-for-all currently taking place among the Circuit Courts regarding the interpretation of "substantial burden" under the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

Westchester Day School's ("WDS") litigation with the Village of Mamaroneck arose out of an application by the school for a modification of its general use permit to allow for an expansion and renovation project. *Westchester*, 2007 U.S. App. LEXIS 24267 at *8. The Village zoning board initially voted that consideration of the project could proceed. *Id.* At the next hearing, however, the zoning board changed their mind and rescinded their vote because of a small but vocal opposition group. *Id.* Instead of taking the next step in the zoning process, WDS chose to sue the Village for violating RLUIPA. *Id.* The district court

---

[1] Although this opinion was recently filed on December 10, 2007, as "not recommended for full-text publication," it is relevant to this important question of federal law.

granted WDS partial summary judgment on the basis of the Village improperly rescinding its vote. *Id.* at *9. Instead of appealing this ruling, the Village decided to conduct hearings on WDS's application, which it eventually denied. *Id.* The Second Circuit specifically noted that instead of choosing to deny WDS's application, the Village "could have approved the application subject to conditions intended to mitigate adverse effects on public health, safety, and welfare." *Id.* at *28. This was an important observation in the Second Circuit's analysis of whether the religious exercise of WDS was "substantially burdened" by the Village. *Id.* at *29.

Petra received similar treatment by Northbrook. Petra's proposal to use their property was initially welcomed by Northbrook as the Village Board of Trustees encouraged the church to proceed after the preliminary review. *See* Petition for Writ of Certiorari ("Petition") at 8. However, after proceeding with its plans, the Village Plan Commission voted against Petra's application after hearing opposition from the public. *See* Petition at 10.

In *Westchester*, WDS ultimately prevailed in its lawsuit, with the Second Circuit concluding "that WDS's religious exercise was substantially burdened by the [zoning board's] arbitrary and unlawful denial of its application." *Westchester*, 2007 U.S. App. LEXIS 24267 at *29. The court also based its holding on "(1) whether there are quick, reliable, and financially feasible alternatives WDS may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditioned." *Id.* at *26. In so holding, the Second Circuit was

"mindful that the Supreme Court's free exercise jurisprudence signals caution in using effect alone to determine substantial burden." *Id.* at *20 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Indeed, the Second Circuit stands in direct conflict with the Seventh Circuit's "effectively impracticable" standard by stating that "a burden need not be found insuperable to be held substantial." *Id.* at *19 (citing, appropriately, *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)). By affirmatively citing *New Berlin*, the Second Circuit suggests an internal confusion over the substantial burden standard even within the Seventh Circuit. This confusion was also recently noted by the Sixth Circuit in *Living Water Church of God v. Meridian,* 2007 U.S. App. LEXIS 28825, *18-19 (6th Cir. 2007) (noting that the Seventh Circuit set its "effectively impracticable standard" in *Civil Liberties for Urban Believers ("CLUB") v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), relaxed that standard in *New Berlin*, then returned to the high "effectively impracticable" standard in *Vision Church v. Village of Long Grove*, 468 F.3d 975, 997-1000 (7th Cir. 2006)).

If Petra were located in New York, the outcome of its case likely would have been different. When Petra bought its property in the I-1 industrial zoning district, its only option for locating in Northbrook was to apply to the Village for a Special Use Permit and a zoning map amendment because religious organizations were not permitted as a matter of right in any of Northbrook's 24 zones. *See* Petition at 7. After passing the Village's preliminary review and proceeding (as the Village urged) with its plans, Petra's application was

effectively denied. *See* Petition at 8-10. As a result, Petra was left with no alternative. Then, Northbrook changed its code to exclude all membership organizations from the I-1 industrial zoning district, including religious organizations. *See* Petition at 15. As noted by the Seventh Circuit, Northbrook could have decided the other way and allowed religious organizations in the I-1 industrial zoning district, but the Village chose not to. *See* Petition at 6a-7a.

These facts certainly would have been relevant under the Second Circuit's "substantial burden" analysis set out in *Westchester*. Although the facts are similar, the Second Circuit found WDS's religious exercise substantially burdened, but the Seventh Circuit held that Petra's was not. These different outcomes clearly show the distinct split between these Circuits in their analysis of "substantial burden" under RLUIPA. This Court's review is needed to bring order to this jumble.

With its opinion in *Westchester*, it appears that the Second Circuit has made the test for showing a "substantial burden" under RLUIPA more reasonable. In doing so, the Second Circuit has now joined the camp of the Fifth, Ninth and Eleventh Circuits, and the Washington and Oregon Supreme Courts, standing opposed to the Seventh and Tenth Circuits (and now the Sixth, as described below) and its own decision in *Rector, Wardens & Members of Vestry v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) on the other side. *See* Petition, Question Presented I; *and see* Amicus Curiae Brief of Pacific Justice Institute at 10-11 and at 5.

In *Living Water Church of God*, 2007 U.S. App. LEXIS 28825 (6th Cir. 2007), the Sixth Circuit has joined the fray. Sending out an S.O.S., the court lamented that "[t]he U.S. Supreme Court has not yet defined 'substantial burden' as it applies to RLUIPA." *Living Water*, 2007 U.S. App. LEXIS 28825 at *14. Although the Sixth Circuit "decline[d] to set a bright line test by which to 'measure' a substantial burden," they instead laid out a "framework" within which to apply the facts. *Id.* at *25. Borrowing from both the Eleventh Circuit's standard in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), and the Seventh Circuit's standard in *CLUB* and *Vision*, which contrasts with *Midrash*, the Sixth Circuit stated its "framework" as a question: "though the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?" *Living Water*, 2007 U.S. App. LEXIS 28825 at *25.

Applying the facts of the case within this framework, the Sixth Circuit reversed the lower district court and held that the township's actions did not substantially burden the church. *Id.* at *39-40. In doing so, however, the result is a high standard similar to that of the Seventh and Tenth Circuits, and the Second Circuit's decision in *Rector, Wardens & Members of Vestry*. And although the concurring judge acknowledged this outcome by advocating the adoption of the Seventh Circuit's *CLUB* standard, she even struggled with the Sixth Circuit's new substantial burden "framework" by pointing out that "[t]he latter

part of this formulation, concerning a hypothetical bar on the use of a religious institution's property, is so broad as to swallow the substantial-burden inquiry." *Id.* at *41. In other words, as the Circuit Courts try to determine standards, definitions and frameworks to analyze "substantial burden" under RLUIPA, they are actually creating a deeper and darker judicial labyrinth where the blind existential rluipian Minotaur is eating the very religious organizations which are seeking it for succor.

Although the Circuits are striving to find a uniform standard, this melee is intensifying rather than subsiding.[2] The confused opinions and conflicting outcomes and approaches of the Circuits serve as a supplication to this Court to bring clarity out of the chaos and to provide the protection that Congress intended in RLUIPA.

---

[2] The additional recent decision in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, et al.*, --- F.3d ---, 2007 U.S. App. LEXIS 27390 (3rd Cir., Nov. 27, 2007), evinces utter confusion about how to decide these types of land use cases with claims brought under both the First Amendment and RLUIPA. Although the *Lighthouse* opinion primarily deals with the "equal terms" provision of RLUIPA, the divided Third Circuit opinion clearly shows the importance and variety of the issues that are dependent on this important question of federal law.

Respectfully submitted,

John W. Mauck
Counsel of Record
Richard S. Bell
J. Lee McCoy, Jr.
Noel W. Sterett
MAUCK & BAKER, LLC
One North LaSalle Street
Suite 600
Chicago, Illinois 60602
(312) 726-1243

Counsel for Petitioner

MOTION FILED

DEC 3 - 2007

(2)

No. 07-585

In The
Supreme Court of the United States

PETRA PRESBYTERIAN CHURCH,

Petitioner,

v.

VILLAGE OF NORTHBROOK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEVIN T. SNIDER,
CA Bar No. 170988*
**Counsel of Record*
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable Chief Justice of this Court:

Pacific Justice Institute (PJI) requests leave to file an amicus brief in support of Petitioner, Petra Presbyterian Church. PJI has obtained the written consent of counsel for Petra Presbyterian Church. Counsel for the Village of Northbrook has been notified of PJI's intention to file this amicus brief, but the Village did not consent.

Pursuant to Rule 37.2(b), PJI moves for leave to file a brief in support of Petitioner on the grounds that there are pertinent points of law which have not been brought to the Court's attention by the parties. So as not to burden the Court, the arguments in this brief are succinct and are set out so that they will serve to assist this Court.

Dated: December 3, 2007

KEVIN T. SNIDER,
CA Bar No. 170988*
**Counsel of Record*
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

MOTION TO FILE *AMICUS CURIAE* BRIEF 1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CIRCUITS ARE SPLIT AS TO WHAT CONSTITUTES A SUFFICIENT SHOWING OF "SUBSTANTIAL BURDEN" 2

A. The Second, Seventh, And Tenth Circuits Interpret "Substantial Burden" In A Constrictive Manner 3

B. "Substantial Burden" Under RLUIPA Is Interpreted Liberally In The Fifth, Sixth, Ninth, And Eleventh Circuits..... 7

i. The Ninth, and Eleventh Circuits have explicitly rejected the *CLUB* approach 7

ii. The Fifth Circuit has adopted a more liberal construction of "substantial burden" 8

C. The Supreme Courts Of Oregon And Washington Have Adopted Liberal Constructions Of "Substantial Burden" 10

TABLE OF CONTENTS – Continued

Page

II. A LIBERAL INTERPRETATION OF "SUBSTANTIAL BURDEN" IS CONSISTENT WITH LEGISLATIVE INTENT 11

A. The Clear Language Of RLUIPA Mandates A Broad And Liberal Construction Of "Substantial Burden" 11

B. The "Effectively Impracticable" Standard Of *CLUB* Is Inconsistent With The "Substantial Burden" Jurisprudence Of This Court 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004) 8, 9

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 11, 12

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).... 3, 4, 7, 8, 12

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123 (Ore. 2005) 10

First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)..... 10

Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006)..... 8, 10, 11

Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983)..... 5

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D. N.J. 2005)..... 6

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988)..... 4

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004)..... 8, 10, 13

Rector, Wardens & Members of Vestry v. City of New York, 914 F.2d 348 (2nd Cir. 1990)..... 5

TABLE OF AUTHORITIES – Continued

Page

Sherbert v. Verner, 374 U.S. 398 (1963) 12, 13

Spratt v. Rhode Island Dept. of Corrections, 482 F.3d 33 (1st Cir. 2007) 6

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) 12, 13, 14

Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) 5

Vision Church, United Methodist v. Village of Long Grove, 397 F. Supp. 2d 917 (N.D. Ill. 2005) 6

Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) 6

STATUTES

42 U.S.C.A. § 2000cc et seq. (RLUIPA) ..... *passim*

RULES

Sup. Ct. R. 10 3

INTEREST OF *AMICUS CURIAE*[1]

Pacific Justice Institute ("PJI") is a nonprofit corporation, operating under 501(c)(3) of the Internal Revenue Code, which engages, in part, in litigation affecting the public interest as it relates to the defense of speech, association, religious exercise, and the establishment clause. As such, PJI routinely represents religious organizations in both administrative proceedings and litigation when rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) are implicated. The case before the Court will have a profound impact on those whom PJI represents as well as this organization's ability to provide legal assistance. Thus, PJI has a strong interest in the outcome of this matter.

SUMMARY OF THE ARGUMENT

Circuit Courts and several state courts of last resort are split over what constitutes a "substantial burden" under RLUIPA. In one camp, the Second, Seventh, and Tenth Circuits have adopted a very

[1] Pursuant to revised Sup. Ct. R. 37 et seq., counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

strict interpretation of "substantial burden" requiring a plaintiff to show that a regulation has made her exercise of religion "effectively impracticable." In an opposing camp, the Fifth, Sixth, Ninth, and Eleventh Circuits, in addition to the supreme courts of Washington and Oregon have adopted a liberal interpretation of "substantial burden." In light of these inter-circuit and state court conflicts, the *amicus* urges this Court to grant the petitioner's writ of certiorari to resolve this split in authority.

Moreover, in light of the plain language of RLUIPA mandating a broad construction of the statute in favor of religious freedom, and the previous jurisprudence of this court in Free Exercise cases, PJI argues that the liberal construction of "substantial burden" is consistent with legislative intent.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CIRCUITS ARE SPLIT AS TO WHAT CONSTITUTES A SUFFICIENT SHOWING OF "SUBSTANTIAL BURDEN."

The Supreme Court should grant the petitioner's writ of certiorari to resolve the conflict between the Circuits regarding the interpretation of "substantial burden." The Court of Appeals of the Second, Seventh and Tenth Circuits have "entered decision[s] in conflict with the decision[s] of" the Fifth, Sixth, Ninth,

and Eleventh Circuits "on the same important matter"; namely the requirements for a showing of "substantial burden" in Religious Land Use cases which involves an increasingly important segment of Free Exercise jurisprudence of the Court. Sup. Ct. R. 10. Moreover, the Fifth, Sixth, Ninth, and Eleventh Circuits have decided this important federal question "in a way that conflicts with decisions by" the Supreme Courts of Oregon and Washington. *Id.* In light of these splits between Circuit courts and state courts of last resort, the Supreme Court should grant the petitioner's writ of certiorari to resolve these conflicts.

A. The Second, Seventh, And Tenth Circuits Interpret "Substantial Burden" In A Constrictive Manner.

The Second, Seventh, and the Tenth Circuits have interpreted "substantial burden" to impose a significantly heavy burden on religious assemblies.

The Seventh Circuit held that in RLUIPA cases, in order to establish a *prima facie* case, a plaintiff must show a "substantial burden" by proving that the land use regulation "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise *effectively impracticable*." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*") (emphasis added). The Seventh Circuit reasoned that,

> Application of the substantial burden provision to a regulation inhibiting or constraining

> *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use – however minor the burden it were to impose – could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.

Id.

Therefore, under the Seventh Circuit standard, "the use of property for religious purposes" is presumptively not an important enough exercise of religion to trigger a "substantial burden" on religion. The religious assembly can only rebut this presumption by making the extremely difficult showing that the regulation necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise *effectively impracticable. Id.*

Similarly the Tenth Circuit, in *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824-25 (10th Cir. 1988), held that a zoning regulation forbidding a congregation from building a house of worship did not place a substantial burden on the church because regulation of the location of church construction was not an impediment to religious observance in the sense of a prohibition. The court held that financial burdens do not rise to the level of infringement of religious freedom. *Id.*

In another pre-RLUIPA religious land use case, the Sixth Circuit observed that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of [a congregation's] religious beliefs." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983). In *Lakewood* the defendant city's zoning plan barred construction of the church on a lot the congregation owned. Under the city's plan, only ten percent of the city's property was land on which a church could be built. Nevertheless, because the effect of the Lakewood ordinance did not completely prohibit the congregation or any other faith from worshiping in the city, the court affirmed the judgment of the district court, stating that "[i]nconvenient economic burdens do not rise to a constitutionally impermissible infringement of free exercise." *Id.* at 306.

Similarly, in *Rector, Wardens & Members of Vestry v. City of New York*, 914 F.2d 348, 355 (2nd Cir. 1990), the court held that "no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." Some other circuits and district courts have followed the lead of the Second, Seventh, and the Tenth Circuits by imposing a strict interpretation of "substantial burden" in RLUIPA cases. *See, Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (holding that church congregation's right to free exercise of religion was not substantially burdened by

zoning ordinance prohibiting religious institutions from conducting worship services within district, and therefore ordinance did not violate Religious Land Use and Institutionalized Persons Act); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507 (D. N.J. 2005) (requirement that church locate in other available areas of city and not in redevelopment zone did not impose substantial burden on religion); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (holding that city denial of conditional use permit to operate church at proposed location based on parking and pedestrian access problems did not "substantially burden" religious exercise); *Vision Church, United Methodist v. Village of Long Grove*, 397 F. Supp. 2d 917 (N.D. Ill. 2005) (holding that denial of special permit to build church did not impose substantial burden on religion, since size of existing building seemed reasonable); *Spratt v. Rhode Island Dept. Of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (assuming, without holding, that a "substantial burden" is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs").

These strict constructions of "substantial burden" under RLUIPA conflict, not only with the language of RLUIPA itself, but also with the more liberal interpretation of "substantial burden" adopted by the Ninth, Fifth, and Eleventh Circuits.

B. "Substantial Burden" Under RLUIPA Is Interpreted Liberally In The Fifth, Sixth, Ninth, And Eleventh Circuits.

The strict interpretation of "substantial burden" in the Second, Seventh, and Tenth Circuits conflicts with the more liberal construction of "substantial burden" adopted by the Fifth, Sixth, Ninth, and Eleventh Circuits. In fact, the Fifth, Ninth, and Eleventh Circuits have explicitly rejected the strict standard of "substantial burden" adopted by the Seventh Circuit. The Sixth Circuit also has adopted a much more liberal interpretation of "substantial burden" under RLUIPA.

i. The Ninth, and Eleventh Circuits have explicitly rejected the *CLUB* approach.

The Ninth and Eleventh Circuits have explicitly repudiated and criticized the Seventh Circuit's "effectively impracticable" definition of "substantial burden." To prevent a burdensome repetition of these circuits' positions, *amicus* refers the Court to Petitioner's Petition For Writ of Certiorari at 19-21. In addition, the Fifth Circuit, after discussing the different standards for "substantial burden" in Religious Land Use cases, has refused to adopt the "effectively impracticable" test of the Seventh Circuit and has instead adopted a more liberal approach.

ii. The Fifth Circuit has adopted a more liberal construction of "substantial burden."

In a very informative decision in *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004), the Fifth Circuit first took note of the split between the circuits as to the exact meaning of "substantial burden" by pointing to the fact that "the RLUIPA does not contain a definition of 'substantial burden,' and the courts that have assayed it are not in agreement." *Id.* at 568. The *Adkins* court went on to explain the differences between the Seventh Circuit "effectively impracticable" approach and the Ninth Circuit and Eleventh approaches by showing the difference between the tests explained in *CLUB*; *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004); and *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 456 F.3d 978 (9th Cir. 2006). The Fifth Circuit did not adopt any of the above approaches and instead adopted an approach that most resembles a mixture of the Ninth Circuit and Eleventh Circuit approaches. *Adkins,* 393 F.3d at 569-570. The Fifth Circuit explained "substantial burden" as follows,

> For purposes of applying the RLUIPA in this circuit, a government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when

> it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id.

The *Adkins* Court rejected the Eighth Circuit requirement that a burdensome practice must effect a "central tenet" or fundamental aspect of the religious belief by emphasizing that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id.* Further, the Fifth Circuit also refused to adopt the "effectively impracticable" standard of the Seventh Circuit and instead requires only a showing that the challenged regulation "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."

Therefore, the definition of "substantial burden" in the Second, Seventh, and Tenth Circuits conflicts with the definition of "substantial burden" adopted by

the Fifth, Ninth, and Eleventh Circuits. But the split as to the definition of "substantial burden" does not end there. The conflict over the meaning of "substantial burden" has also reached several state courts of last resort.

C. The Supreme Courts Of Oregon And Washington Have Adopted Liberal Constructions Of "Substantial Burden."

The Supreme Courts of Oregon and Washington have also refused to follow the "effectively impracticable" approach of the Seventh Circuit and have adopted a more liberal construction of "substantial burden" similar to that of the Eleventh Circuit in *Midrash*.

In *First Covenant Church v. City of Seattle*, 840 P.2d 174, 184 (Wash. 1992), the Supreme Court of Washington, following this Court's jurisprudence in religious taxation cases, stated that "a financial burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." This formulation of the rule is in direct conflict with the "effectively impracticable" requirement in the Seventh Circuit. *See* Petitioner's Petition for Writ of Certiorari at 21.

Moreover, in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005), the Supreme Court of Oregon adopted a definition of "substantial burden" that closely resembles the definition of Eleventh and Ninth Circuits in *Midrash*, and *Guru*

Nanak, holding that "a government regulation imposes a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." Thus, in Oregon, a religious assembly need not show that the challenged regulation made it's practice of religion "effectively impracticable." Instead, there is a lesser showing that the regulation "pressured" the religious assembly to make a choice between following religious percepts and forfeiting *benefits. Id.*

II. A LIBERAL INTERPRETATION OF "SUBSTANTIAL BURDEN" IS CONSISTENT WITH LEGISLATIVE INTENT.

A. The Clear Language Of RLUIPA Mandates A Broad And Liberal Construction Of "Substantial Burden."

The language of the statute states that "this chapter [RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. §§ 2000cc-3(g). As Justice Powell articulated the legal maxim, the plain meaning of the words of the statute are always the starting point in statutory construction. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Thus, according to the language on the face of the statute, the courts should construct the words of the statute, including

"substantial burden," liberally and "in favor of a broad protection of religious exercise." *Id.*

The "effectively impracticable" standard imposed on religious assemblies in the Seventh Circuit cannot be reconciled with the legislative intent to provide "broad protection" to religious exercise to the "maximum extent permitted by the terms of . . . [RLUIPA] and the Constitution." In sum, the question that courts should ask when interpreting substantial burden is: What is the maximum extent to which a local government can accommodate the free exercise of religion? Therefore, the constrictive interpretations by some of the circuits is inconsistent with the intent of Congress when it provided for "broad protection" of religious exercise.

B. The "Effectively Impracticable" Standard Of *CLUB* Is Inconsistent With The "Substantial Burden" Jurisprudence Of This Court.

The previous jurisprudence of this Court, as evidenced from the decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Thomas v. Review Bd. of the Ind. Employment Sec. Div.,* 450 U.S. 707 (1981), mandates a liberal interpretation of "substantial burden" in RLUIPA cases.

This Court has held that unemployment compensation regulations may impose a "substantial burden" on a beneficiary's free exercise if the regulations pressure the beneficiary to modify her religious

beliefs in order to receive unemployment benefits. *Sherbert,* 374 U.S. 398; *Thomas*, 450 U.S. 707. Thus, in *Sherbert*, this Court held that where a Seventh Day Adventist terminated her employment because she refused to work on Saturdays due to her religious beliefs, the unemployment compensation benefits that denied her compensation "substantially burdened" her free exercise of religion. *Sherbert*, 374 U.S. at 406.

In a similar ruling in *Thomas*, this Court held that a choice between unemployment benefits or religious duties imposed a "substantial burden" because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas,* 450 U.S. at 717-18. These cases demonstrate "that a 'substantial burden' must place more than an inconvenience on religious exercise." *Midrash Sephardi,* 366 F.3d at 1227.

In neither *Sherbert* nor *Thomas* was the plaintiff required to show that the unemployment benefit regulations made the exercise of her religion "effectively impracticable." Indeed, it is doubtful that either plaintiff could have made such a showing, since both plaintiffs were free to exercise their religion with minor modifications or compromises or forgo their unemployment benefits. Therefore, the regulations in *Sherbert* and *Thomas* did not make the practice of religion, "effectively impracticable" for the plaintiffs. Nonetheless, this Court found that the regulations in those cases did in fact impose a substantial burden on plaintiffs because these regulations

exerted a "substantial pressure on an adherent to modify his behavior." *Thomas,* 450 U.S. at 717-18.

Since the "effectively impracticable" approach adopted by the Seventh Circuit is inconsistent with the previous jurisprudence of this court in Free Exercise cases, the Fifth, Ninth, and Eleventh Circuits have refused to adopt a strict interpretation of "substantial burden," and have instead interpreted "substantial burden" more liberally.

In light of the plain language of RLUIPA in favor of a broad construction and the previous jurisprudence of this court in Free Exercise cases, the *amicus* respectfully urges the Court to adopt a liberal interpretation of "substantial burden" as explained by the Ninth Circuit.

CONCLUSION

In view of the inter-circuit conflict between the Circuit Courts and the split of authority between the Circuits and the state courts of last resort regarding the meaning of RLUIPA's "substantial burden," the petitioner for certiorari should be granted. Indeed, a primary function of this Court is to provide clarity in interpretation of the laws of the land. Both religious assemblies and local governments are in need of a clear standard relative to RLUIPA. Such a uniform understanding of the law will serve to reduce litigation in this area. It is in the public interest to avoid litigation due to the law's uncertainty in this area in

that said lawsuits deplete the coffers of both local government as well as religious nonprofits.

Dated: December 3, 2007

Respectfully submitted,

By: PACIFIC JUSTICE INSTITUTE

KEVIN T. SNIDER,
CA Bar No. 170988*
*Counsel of Record for
Amicus Curiae
MATTHEW B. MCREYNOLDS,
CA Bar No. 234797
Post Office Box 276600 (mail)
9851 Horn Road, Suite 115
(deliveries only)
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amicus Curiae